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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POWELL PRESSED STEEL COMPANY,
Petitioner,

v.

JOSEPH POLICY, WILLIAM DRISCOLL,
JOHN CHUFO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Due to economic difficulties, the employer closed its plant and the collective bargaining agreements, including the provisions for retiree health insurance benefits, expired. The Union sued to have these benefits restored, but the district court made a factual determination that the parties' contractual intent was *not* to provide lifetime insurance benefits. The court of appeals, however, adopted the broad presumption that "retiree benefits normally vest as a matter of course upon retirement and are interminable." It then reviewed the facts and decided—contrary to the district court—that the parties *did* intend to provide lifetime health insurance benefits. The holdings present the following questions:

Question 1:

Whether the court of appeals' broad presumption that retiree benefits normally are vested and therefore interminable can be reconciled with the decisions of this and other courts that such benefits are not presumptively vested and can be determined to be lifetime benefits only after an analysis of the parties' contractual intent. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co. (PPG)*, 404 U.S. 157 (1971).

Question 2:

Whether the court of appeals' refusal to accept the district court's determination that the contract was not intended to provide lifetime health insurance to retirees was contrary to the requirements of Rule 52(a), Fed. R. Civ. P., that the evaluation of oral or documentary evidence is not for the court of appeals but rather for the district court to make either in the first instance or upon remand. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, —— U.S. ——, 105 S.Ct. 1504 (1985).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 770 F.2d 609 (6th Cir. 1985).[1] The district court's unofficially reported opinion (Pet. App. 20a) is found at 118 L.R.R.M. (BNA) 2483 (N.D. Ohio 1984). The district court's opinion denying injunctive relief (Pet. App. 36a) is unreported.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1985). The opinion and judgment of the court of appeals were entered on August 20, 1985. As

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[1] "Pet. App." references are to the appendix to this petition.

required by 28 U.S.C. § 2101(c) (1985) and Rule 20.4, Supreme Court Rules, this petition has been filed within 90 days of the denial of rehearing entered by the Sixth Circuit on October 15, 1985.

STATUTORY PROVISIONS

Rule 52(a), Federal Rules of Civil Procedure:

> . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

Labor Management Relations Act, Section 301(a), 29 U.S.C. § 185(a) (1985):

> Suits for violation of contracts between an employer and a labor organization representing employees in a industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[2]

STATEMENT OF THE CASE

The court of appeals, in exercising its supervisory authority, overturned the district court's determination of the intent of the parties in their collective bargaining agreement and, instead, substituted its own determination that the contracting parties intended that the company would provide health insurance benefits for the life of retirees. In so holding, the court of appeals applied a

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[2] This suit also was brought in the district court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a) (1985). Because it disposed of the case on other grounds, however, the court of appeals below declined to address the ERISA issues. (Pet. App. 15a).

broad presumption that retiree insurance benefits normally are nonforfeitable and, once bargained, are interminably vested and survive the closing of the plant and the expiration of the labor contract from which they were derived.

Health Insurance Benefits: Factual Background

The health insurance benefits at issue are found in the Insurance and Pension Agreements between the petitioner, Powell Pressed Steel ("Powell") and the United Steelworkers of America ("Steelworkers") which expired on August 31, 1982. (Pet. App. 54a-58a). Over a long period of time, Powell had negotiated and entered into a series of agreements with the Steelworkers. No health insurance benefits for retirees were provided until the 1964 Agreement. (Pet. App. 2a). Later Agreements were renegotiated with the Steelworkers from 1966 up to and including the final 1979 Agreement. *Id.* The Insurance Agreement specifically calls for renegotiation at the time set forth in the Basic Collective Bargaining Agreement (Pet. App. 57a). With the expiration of each Agreement, the Steelworkers notified Powell that it wished to renegotiate the Agreements. (Defense Exs. A, B and C). As the trial testimony indicated, in none of these notices or negotiations did the Steelworkers exempt union retiree insurance benefits from negotiation or state that any retiree benefits were untouchable, permanent or nonforfeitable.[3]

For several years prior to the expiration of the 1979 Agreement, Powell had been experiencing substantial financial losses.[4] On April 30, 1982, Powell ceased operations at the plant. The last Agreement expired on August 31, 1982. (Pet. App. 3a, 20a, 57a). All union re-

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[3] Tr., Powell, pp. 15, 16; Tr. Covington, pp. 11, 12, 17. "Tr." references are to the transcript in the injunctive proceeding before the district court.

[4] Tr. Powell, p. 7.

tiree insurance benefits which had been provided solely pursuant to the collectively-bargained-for terms of the Agreements were terminated in accordance with the Agreement's expiration date. (Pet. App. 20a). The Steelworkers filed this suit seeking reinstatement of the health insurance benefits.

The Insurance Agreement

Applying previous Sixth Circuit precedent, the district court determined that it "must first look to the intent of the parties to determine whether retirees' insurance benefits continue beyond expiration of a collective bargaining agreement." (Pet. App. 27a-28a). *See Yard-Man*, 716 F.2d at 1479.[5] In determining the parties' intent, it examined the relevant provisions of the Insurance Agreement, Section 3 of which provides in part:

> *Despite anything to the contrary herein contained*, present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, *subject to the conditions hereinafter set forth*, receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner.[6]

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[5] *Int'l Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1002 (1984).

[6] Section 3 of the Insurance Agreement also provides:

> In order to be eligible for the above coverage, employees who reach age sixty-five (65) during the term of this contract, or any extension hereof, and become eligible for pension must decide, on or before three (3) months after said employee's sixty-fifth (65th) birthday, whether to retire or continue to work. If the employee continues to work beyond the three (3) month period, he will be deemed to have waived the provisions of this Section 3 and will not thereafter, during the term of

(Pet. App. 23a, 56a, emphasis added). As in all the previous Agreements, Section 8 of the Insurance Agreement contains a specific termination provision. It states: "This Agreement shall become effective on September 1, 1979, and shall remain in effect until midnight, August 31, 1982." (Pet. App. 23a, 57a).

The Pension Agreement

The district court also compared the provisions of the Insurance Agreement with those of the Pension Agreement. Article III, Section 1, of the Pension Agreement provides in relevant part:

> . . . The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. The Company will continue to provide, at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over.

(Pet. App. 24a, 52a).[7] Further, Article X, Section 7 of the Pension Agreement states that:

> Any *pension* properly payable pursuant to this Agreement shall continue to be payable, *notwithstanding the termination or expiration of this Agreement.*

(Pet. App. 24a, 60a, emphasis added).

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this Agreement, receive insurance coverage as herein set forth in Section 3.

(Pet. App. 56a). The entire Insurance Agreement is set forth in Appendix I, Pet. App. 54a-57a.

[7] The relevant portions of the Pension Agreement are set out in Appendix J, Pet. App. 59a-61a.

The District Court's Hearings

Prior to determining whether these provisions provided for interminable, lifetime health insurance benefits, a trial was held at which the district court observed witness testimony and received documentary evidence. The hearing was held on the Steelworkers' request for injunctive relief, which was denied. (Pet. App. 2a, 21a, 36a). Pursuant to Fed. R. Civ. P. 65(a)(2), the parties agreed that the district court should then decide the merits of the case based upon the record made in the injunctive proceeding. (Pet. App. 2a, 21a-22a).

The Contract is Found "Ambiguous"

Having observed the witnesses and examined the documentary evidence, the district court determined that the insurance benefits were not vested beyond the expiration of the Agreement. In rejecting the Steelworkers' vesting argument, the district court first determined that the language of the Insurance Agreement was "ambiguous." (Pet. App. 29a). It noted that Section 8 had a specific termination date and remained in effect only until a specified date. *Id.* It then noted that Section 3 had apparently contradictory language, stating that retirees' health insurance benefits would be provided both: (a) "[d]espite anything to the contrary contained herein"; and (b) "subject to the conditions hereinafter set forth." *Id.* Because of the ambiguity of this language, the court looked to the remainder of the Agreement and the actions of the parties to determine their intent.[8] (Pet. App. 29a-33a).

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[8] Evaluating the actions of the parties, the district court concluded that Powell had continued retiree health insurance benefits during a strike "solely as a goodwill gesture" and not because of any obligation after the contract expired. (Pet. App. 31a-32a). It also evaluated testimony presented by the Steelworkers as consistent with the court's conclusion that the benefits were not vested. (Pet. App. 32a-33a) As to plaintiffs' ERISA claims, the district court observed that this case does not involve a pension plan covered by

It found that, unlike the unfunded Insurance Agreement, the funded Pension Agreement had the "unambiguous" language that pensions "shall continue to be payable notwithstanding the termination or expiration of this Agreement." (Pet. App. 30a). As stated by the district court: "[the] parties clearly knew how to draft a provision that would continue beyond the termination of the agreement." *Id.* This textual difference thus provided further indication of the parties' intent that health insurance benefits would not survive the Agreement's expiration. Also, Judge Manos observed that the parties provided a separate fund for the retirees' pensions, yet no such fund was provided for health insurance benefits. *Id.*

Finally, citing *Yard-Man*, 716 F.2d at 1482, the court concluded that "[n]o federal policy identified to this Court presumptively favor[s] the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent." (Pet. App. 31a). The district court ruled in favor of Powell, finding that the health insurance benefits were not vested and not intended to continue past the Agreements' negotiated expiration date. (Pet. App. 35a).

The Court of Appeals Reversal

The Sixth Circuit rejected the district court's evaluation of the evidence and its determination that the parties did not intend to provide union retirees with these benefits past the date of the labor contract's expiration. The Sixth Circuit, moreover, prefaced its factual analysis with several broad presumptions about the permanent status of collectively-bargained retiree insurance benefits. The court first declared that:

ERISA's statutory vesting requirements. *Id.*, at 35a n. 19. Thus, it reasoned that whether or not these insurance rights are vested depends solely upon the terms of the agreement. *Id.*, at 33a-34a.

> Contract interpretation is a question of law, not subject to the clearly erroneous standard. *Chevron, U.S.A. v. Belco Petroleum Corp.*, 755 F.2d 1151, 1153-54 (5th Cir. 1985). Thus, when reviewing the trial court's interpretation of a contract, an appellate court is not limited to the clearly erroneous rule, since a district judge's conclusions of law are freely reviewable by the court of appeals. *Washington [Metropolitan] Area Transit Authority v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980).

(Pet. App. 5a) (Footnote omitted).

The Sixth Circuit then adopted the presumption that "retiree benefits normally vest as a matter of course upon an employee's retirement and are interminable." (Pet. App. 14a, 8a). It also presumed, citing *Yard-Man* at 1482, that " 'retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite [retirement] status is maintained.' " *Id.* The court further assumed that:

> The union may not, however, "bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon an employee's retirement are *interminable* and the employer's failure to provide them [is] actionable under § 301 by the retiree. . . ."

(Pet. App. 8a; citations omitted; emphasis added). Notably, these broad assertions by the Sixth Circuit are not limited to health insurance benefits, but rather appear to apply to retirement benefits generally.

Notwithstanding these predetermined assumptions, the Sixth Circuit then purported to apply the earlier *Yard-Man* holding which "laid out the manner in which a court should proceed when examining the duration of retiree benefits" (Pet. App. 6a). It noted, citing *Yard-Man*, that:

> [W]hether retiree insurance benefits continue beyond the expiration of the collective bargaining

> agreement *depends upon the intent of the parties.* Clearly the parties to a collective bargaining agreement may provide for rights which survive termination of their collective bargaining relationship . . . . *Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement.*

(Pet. App. 6a; emphasis added). The court then made its own independent determination that the negotiated provisions of the Insurance and Pension Agreements were intended to confer permanent lifetime health insurance benefits on Powell's union pensioners. (*Id.* at 8a-14a).[9]

Thus, the Sixth Circuit concluded that, "as a matter of law," the health insurance benefits survived expiration of the collective bargaining agreement. (Pet. App. 19a). The court vacated the trial court's judgment in favor of Powell and remanded for further proceedings including class certification and damages issues. (Pet. App. 19a).

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[9] As at n. 2, *supra*, the Sixth Circuit declined to reach the plaintiffs' ERISA claims. Thereafter, the Sixth Circuit denied Powell's petition for rehearing (Pet. App. 52a), but then granted Powell's motion to recall the mandate and issued a stay pending application for writ of certiorari (Pet. App. 51a). On November 26, 1985, the district court, noting that the mandate had been stayed, transferred the case onto suspended status (Pet. App. 50a).

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S BROAD PRESUMPTION THAT RETIREE BENEFITS NORMALLY ARE INTERMINABLY VESTED CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS, MISCONSTRUES NATIONAL LABOR POLICY, AND VIOLATES THE PROPER SCOPE OF APPELLATE REVIEW BY SECOND-GUESSING THE DISTRICT COURT'S FACTUAL DETERMINATION OF THE INTENT OF THE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT.

A. The Sixth Circuit's Presumption That Retirement Benefits Normally Are Vested As A Matter Of Course And Are Interminable Is Contrary To This Court's *PPG* Decision And The Decisions Of Other Courts.

1. *This Court Has Held That Contractually-Based Retirement Benefits Are Not Necessarily Permanent, Are Not Presumptively Vested And May Be Modified If Allowed By Contract.*

The Sixth Circuit has adopted the unsupportable general premise that "retiree benefits normally vest as a matter of course upon an employee's retirement and are interminable." (Pet. App. 14a, 8a). This Court has never accepted that proposition, and numerous lower court decisions specifically have held just the opposite. This conflict in decisions creates uncertainty for employers throughout the Sixth Circuit, not only as to the nature and extent of their obligations to retired employees, but also as to the scope of permissible collective bargaining about retirees' insurance benefits.

The Sixth Circuit's decision cannot be reconciled with this Court's decision in *Pittsburgh Plate Glass (PPG)*,[10] which held that an employer did not violate its bargaining obligation under the National Labor Relations Act by

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[10] *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company (PPG)*, 404 U.S. 157 (1971).

unilaterally terminating retiree health insurance benefits over the objection of the union. In *PPG*, the union filed an unfair labor practice charge protesting the employer's unilateral decision to drop a retiree health insurance plan (on the effective date of Medicare) without negotiating with the union. The collective bargaining agreement was still in effect, the retirees clearly were entitled to these benefits under the existing contract, and the union had sought mid-term renegotiation. Protesting the employer's decision, the union asserted that a modification in retiree health insurance benefits was a mandatory subject of bargaining.

This Court held that no unfair labor practice had occurred because the rights of retirees were not mandatory subjects of bargaining. As Justice Brennan noted, nowhere in the history of the National Labor Relations Act "is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute." 404 U.S. at 166.

The Court relied upon several premises directly applicable to this case. First, active and retired workers "plainly do not share a community of interests. . . ." *Id.* at 173. Retirees' interests "extend only to retirement benefits, to the exclusion of wage rates, working conditions, and all other terms of active employment." *Id.* Thus, the Court asserted that:

> [T]he risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.

Id. at 173 (footnote omitted). Plainly, the union "would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times be preferred to those of retirees." *Id.* at 173 n.12.

Justice Brennan made it abundantly clear that preexisting retiree rights may be modified. He stated that, "[h]owever, nothing we hold today precludes permissive bargaining over the benefits of already retired employees." *Id.* at 171 n.11. Expanding on that point, the Court stated that:

> Having once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obligated to negotiate in behalf of retirees again. To the contrary, they are free to decide, for example, that current income is preferable to greater certainty in their own retirement benefits or, indeed, to their retirement benefits altogether. By advancing pensioners' interests now, active employees, therefore, have no assurance that they will be the beneficiaries of similar representation when they retire. *The insurance against future contingencies that they may buy in negotiating benefits for retirees is thus a hazardous and, therefore, improbable investment, far different from a cost-of-living escalation clause that they could contractually enforce in court.*

Id. at 181-82 (emphasis added) (footnote omitted).

Thus, far from adopting a presumption that negotiated retirement benefits are normally vested, the Court—for the practical and legal reasons described above—established the general proposition that previously negotiated retirement benefits generally are *not* interminable. Indeed, Section 7 of the Insurance Agreement here specifically establishes a time to renegotiate the terms of the Agreement. (Pet. App. 57a). The broad presumption adopted by the court of appeals here, that retiree benefits vest upon retirement and thereby become "interminable", is a misapplication of the *PPG* decision which, if followed in the Sixth Circuit or the other federal courts, would place them directly at odds with the federal national labor policy as articulated by this Court in *PPG*.

The Sixth Circuit's presumption of interminability would not be limited to insurance benefits but could block the ability of parties to a collective bargaining agreement ever to change retiree benefits once they have been adopted by contract. Such restrictions would greatly limit the ability of employers and unions to negotiate with the flexibility required the *PPG* decision. As this Court recognized, "[o]ther considerations, such as the effect on the employer's freedom to conduct his business, may be equally important." *Id.* at 179 n.19.

Therefore, "[b]ecause of the importance of [this question] to the realization of national labor policy," [11] this Court should grant this petition to determine whether the collective bargaining rights of retirees were properly presumed to be vested and interminable.

2. *Contrary To The Sixth Circuit's Ruling, Other Courts Have Held That There Is No Presumption That Retirement Benefits Are Vested And That The Plaintiff Bears The Burden Of Establishing The Parties' Contractual Intent.*

There is no question that parties to a collective bargaining agreement may provide retiree insurance benefits which will survive termination of their collective bargaining agreement. *Upholsterer's Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427, 428 (6th Cir. 1967). The *PPG* decision recognized that the rights of retirees that already have "vested" may be protected, and that principles of contract interpretation apply:

> This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested

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[11] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544 (1964) (rights conferred by collective bargaining can extend beyond the termination of operations if the parties' agreement so provides).

> *retirement rights* may not be altered without t
> petitioner's consent.

404 U.S. at 181 n.20. Accordingly, rather than presum
ing that retirement benefits are vested, it is necessary
inter[illegible] contract between the parties and find a
firma[illegible]vidence of an intent to adopt lifetime ben
fits.[12]

The court of appeals, however, misapplied well-accepte
principles of contract construction and lost sight of th
"traditional reluctance of courts to construe employme
contracts as life time guarantees." *Heheman v. E.W
Scripps Co.*, 661 F.2d 1115, 1121 (6th Cir. 1981), *reh
denied* (1982). As noted, the court held that "retir
benefits normally vest as a matter of course upon a
employee's retirement and are interminable." (Pet. Ap
8a, 14a).

This vesting theory of the panel below is contrary
Yard-Man, which specifically stated that no such pr
sumption exists:

> This is not to say that retiree insurance benefits a
> necessarily interminable by their nature. *Nor do
> any federal labor policy identified to this Court pr
> sumptively favor the finding of interminable righ
> to retiree insurance benefits when the collective ba
> gaining agreement is silent.*

716 F.2d at 1482 (emphasis added).[13] *See also, Int'l U
ion, United Automobile, Aerospace and Agricultural I
plement Workers of America (UAW) v. Cadillac Mal
able Iron Company, Inc.*, 728 F.2d F.2d 807, 808 (6

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[12] *Int'l Union, United Automobile, Aerospace, and Agricultu
Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F
1476, 1479 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S
1002 (1984).

[13] *Yard-Man* is the primary authority upon which most of
decisions considering these issues have relied to analyze their
specific facts.

Cir. 1984) (". . . there is *no legal presumption* [*of lifetime insurance benefits*] based on the status of retired employees . . .") (emphasis added). Thus, the Sixth Circuit in *Cadillac Malleable* specifically rejected the district court's "presumption in favor of vested retirement benefits in the absence of clear evidence indicating a contrary intention. *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Cadillac Malleable Iron Co.*, 3 EBC (BNA) 1369, 1374 (W.D. Mich. 1982), *rev'd*, 728 F.2d 807 (6th Cir. 1984). In the instant case however, the Sixth Circuit has adopted a presumption it previously found untenable.

The Ninth Circuit also has held that health and welfare benefits of retirees were not vested but were instead "contractual rights subject to amendment by the parties to the agreement." *Turner v. Local Union No. 302, Int'l Bro. of Teamsters*, 604 F.2d 1219 (9th Cir. 1979). Consistent with the *PPG* decision, the Ninth Circuit in *Turner* held that:

> Of necessity, however, collective bargaining agreements [which provide retiree insurance benefits] must be flexible and subject to change. . . . It is frequently necessary to modify a contract to meet changing conditions.

604 F.2d at 1226.[14] Accordingly, "[*t*]*he burden is on the plaintiffs* to show that the parties intended retirees'

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[14] Several other decisions also recognize that retirement benefits are not presumptively vested, are not interminable and can be modified. In *Dwyer v. Climatrol Industries, Inc.*, 544 F.2d 307, 310 (7th Cir. 1976), *cert. denied*, 430 U.S. 432 (1977), the court, citing *Waters v. Wisconsin Steel Workers of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970), stated:

> Since parties to a labor contract are always free to amend their agreements, we do not see how an amendment through the ordinary processes of collective bargaining can be considered a breach of contract.

Accord, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. New Castle Foundry,

benefits would be vested and not tied to the agreement which created them." *Local Union No. 150-A, United Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985) (emphasis added).[15]

By presuming that retirement benefits are vested and interminable, the Sixth Circuit's approach improperly establishes and substitutes a judicial presumption for an open minded, flexible determination of the intent of the parties. *What the parties intended is a question of fact that is not amenable to a predetermined supposition as to what that intent included.* It would be no more appropriate to require an employer to disprove a presumption that retirement benefits are vested and interminable than it would be to require a respondent in a civil rights action to prove the absence of discriminatory motive. *See Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

In its Opposition to Powell's Motions to Recall Mandate and For Stay of Mandate, the Respondents argued that there was no circuit conflict, and thus this petitoin was not likely to be granted. Respondent's cited cases,

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Inc., 4 EBC (BNA) 2455, 2456 (S.D. Ind. 1983) ("The vesting of contractual health and welfare insurance retirement benefits, unlike the vesting of pension benefits, is not governed by [ERISA]. Thus, such benefits do not survive the expiration of the collective bargaining agreement unless the agreement so provides."); and *Int'l Union, United Automobile, Aerospace, and Agricultural Implement Workers (UAW) v. Roblin Industries*, 561 F. Supp. 288, 298-99 (W.D. Mich. 1983).

[15] *Accord, United Steelworkers v. North Bend Terminal*, —— F.2d ——, 6 EBC (BNA) 1299, 1304 (6th Cir. 1985) (". . . the whole burden of proof is on the party alleging breach of a collective bargaining agreement under Section 301. . ."); *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. Lee National Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971) ("Even if we were to assume that [the agreement] is ambiguous, the Union does not propose to offer any evidence to the effect that the term was intended to continue group life insurance in effect after the termination of the [agreement].").

however, reveal just the opposite. Thus, as noted above, *Dubuque Packing* specifically states that the "burden is on the plaintiffs" to show that the insurance benefits are vested. 756 F.2d at 70. In *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), the court made no mention of any presumption favoring vesting. To the contrary, the Court stated that, unlike *Yard-Man*—where the court of appeals ruled that those particular rights were vested—the plaintiffs in *Bunker Hill* "[did] not seek an order directing an award of summary judgment in their favor." 725 F.2d at 1223. The Ninth Circuit merely determined that there were issues of material fact that should be determined by the district court. Unlike the Sixth Circuit here, the Ninth Circuit *remanded* the case for additional factual determinations. *Id.* at 1225.[16]

The presumption established by the Sixth Circuit thus imposes a judicial preconception and preference as to the particular gloss to be placed on an agreement made by two private parties. This Court has recognized that the federal courts are not authorized to review for reasonableness the provisions of collective bargaining agreements regarding health insurance benefits as long as the provision does not violate a specific federal law—a condition absent here. *United Mine Workers of America v. Robinson*, 455 U.S. 562, 575 (1982). As stated in *Rob-*

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[16] The other cases cited by Respondent made a purely factual analysis to determine whether the rights were vested. Unlike the Sixth Circuit's approach here, no presumptions were engaged. *See District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 590 (4th Cir. 1985) ("Whether an employer's obligation to provide benefits to its retirees continues beyond the expiration of the underlying [contract] depends upon the intent of the parties."); and *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196, 214 (W.D.N.Y. 1984) (Although retiree benefits are "in a sense 'status' benefits . . . such implication, in and of itself would be insufficient to support a finding of intent to establish an interminable benefit" without looking to extrinsic evidence).

inson, "we previously have recognized [in *PPG*] that former [union] members and their families may suffer from discrimination in collective bargaining agreements. . . ." 455 U.S. at 574.[17] For this additional reason, the petition should be granted and the Court should determine whether the Sixth Circuit's presumption impermissibly predetermines the intent of parties to a collective bargaining agreement.

3. *Prohibitive Insurance Rates For Groups Made Up Only Of Retirees Is A Judicially-Recognized Reason For Not Presuming That Retiree Insurance Benefits Are Vested And Extend Beyond The Term Of A Collective Bargaining Agreement.*

The health insurance benefits in this case were not previously funded but were to be paid on a continuing basis. (Pet. App. 12a, 33a). Prior to the plant shutdown, the insurable group of employees and retirees was composed of persons of widely different ages, and the risk to the insurer could be spread over this entire group. But, when the plant closed down and the only remaining insured were retirees in the oldest age group, the insurance costs would skyrocket and make insurance coverage virtually prohibitive. This same problem was recognized in *Roblin Industries*, 561 F. Supp. at 299 (emphasis added):

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[17] One commentator has noted that some courts tend to impose insurance or pension obligations even when that result is not justified by application of principles of contract interpretation. J. Murray, *Murray on Contracts* (1974) at 31 n. 17. The author observed that:

> The result in these cases is often the product of spurious interpretation by courts which dislike the provisions excluding legal sanctions when the subject matter involved is the kind that is normally considered appropriate in enforceable contracts. In addition, it is doubtful if these decisions are in line with sound public policy since they tend to discourage the making of such promises. *Id.*

> The undisputed testimony of defendant's expert established that group insurance which rests upon the insurability of the entire group would almost be unobtainable for a group limited to retirees. *This fact has been consistently viewed by courts as evidence that retiree benefits were not intended to extend beyond the duration of collection bargaining agreements.*[18]

As stated by this Court in *Robinson*, "inevitably, financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits." 455 U.S. at 575.

The economic consequences of the Sixth Circuit's decision could be enormous, particularly for employers and employees who are involved in a plant shutdown forced by economic difficulties. Thus, it has been estimated that the Fortune 500 companies alone have retiree health-care benefits liability of $2 trillion, while the total assets for these companies is only $1.3 trillion. *Corporate Retiree Health Benefits: Here Today, Gone Tomorrow?* A Briefing Paper for a Hearing of the House Select Committee of Aging, June 27, 1984, at p. 1. Moreover, "[n]ationally more than 5.5 million middle-aged and elderly retirees are receiving all or part of their health benefits from their former employer or from their union. In addition, more than 3.8 million spouses . . . are receiving employer- or union-sponsored health coverage." *Id.* at p. 2. Indeed, "[i]n the older 'smokestack' industries, . . . it is not uncommon for employers to have twice as

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[18] *Accord, Lee National Corp.*, 323 F. Supp. at 1188 ("The intent to terminate as to *all* employees, including retirees, is fortified by the undisputed fact that group insurance, which rests upon the insurability of the *entire* group, would be unobtainable, except possibly at prohibitive rates, for a group limited to retirees, who are for the most part over 65 years of age.") (emphasis in original).

many retirees as employees." *Id.* at 1. This Court, therefore, should review this case because of the important implications it holds for the rights of retirees, employers and insurers.[19]

B. The Sixth Circuit Violated Rule 52(a), Fed. R. Civ. P., By Failing To Accept The District Court's Determination Of The Parties' Intent And Making Its Own Factual Interpretation Of The Contract.

The Sixth Circuit improperly set aside the district court's findings and made its own factual determination that the parties intended the contract to provide permanant lifetime insurance benefits. It thus proceeded in a manner that patently violates Rule 52(a), Fed. R. Civ. P., and this Court's decisions in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) and *Anderson v. City of Bessemer City*, —— U.S. ——, 105 S.Ct. 1504 (1985). Rather than applying the "clearly erroneous" rule of review, it made its own factual analysis and—without remanding the case to the district court—made a final disposition of the issues of the parties' intent.

1. *Under* Pullman-Standard v. Swint, *The Issue Of The Parties Intent Was A Question Of Fact And The Court Of Appeals Erred In Not Deferring to The District Court's Determination Or Remanding The Case For Further Proceedings.*

This Court specifically and repeatedly has condemned the procedure adopted by the Sixth Circuit. *Pullman-Standard* unequivocally states that the issue of intent "is a pure question of fact." 456 U.S. 288 & n.16. It

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[19] This Court previously has granted petitions for certiorari in order to address the issue of whether financial implications warrant only *prospective* application of its holdings. *See City of Los Angeles, Dept. of Water and Power*, 435 U.S. 702, 718-23 (1978); and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

found there that the manner in which the court of appeals had proceeded was "incredible" (456 U.S. at 293) in view of the strictures of Rule 52(a) which prohibited it from reexamining the record and making its own independent findings. The Sixth Circuit here made the very same mistake and incredibly *did not even cite* the *Pullman-Standard* decision. The proper procedure under *Pullman-Standard* would have have been to defer to the district court's determination unless it was clearly erroneous.[20]

That the issues presented here were factual is evident from the contract interpretation principles set forth in the Sixth Circuit's *Yard-Man* decision upon which the court below specifically relied:

> Many of the basic principles of contractual interpretation are fully appropriate for discerning the parties' intent in collective bargaining agreements. For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. . . . The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. . . . Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. . . . *Finally, the court should review the interpretation ultimately derived from its examination*

[20] The Court in *Pullman-Standard* noted that the issue of whether "mixed questions of law and fact" fall under that decision was not being decided. Should this Court determine here that such mixed issues are involved, we submit that the appropriate procedure would be to grant the petition to determine the open question of whether such issues, as posed by the interpretation of a collective bargaining agreement, are properly to be determined under the "clearly erroneous" or the "*de novo*" standard.

> *of the language, context and other indicia of intent for consistency with federal labor policy. This is not to say that the collective bargaining agreement should be construed to affirmatively promote any particular policy but rather that the interpretation rendered not denigrate or contradict basic principles of federal labor law.*

716 F.2d at 1479-80. (Emphasis added; citations and text omitted).

The district court here fully and conscientiously considered all these factors. But rather than leave the factual determination to the district court, the Sixth Circuit made its own unwarranted factual determination, which was contrary to that of the district court. It now appears that questions of fact and itnent in retiree insurance benefits cases effectively have been taken away from the district courts by the Sixth Circuit.[21]

But even if a question of law is involved, it was clear error for the court below to fail to remand the case to the district court instead of finally deciding the case. The *Pullman-Standard* decision mandates that:

> When an appellate court discerns that a district court has failed to make a finding because of an

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[21] The Sixth Circuit made a similar, and equally egregious error in *Weimer v. Kurz-Kasch, Inc.*, —— F.2d ——, 120 L.R.R.M. (BNA) 2432 (6th Cir. 1985), *petition for reh'g pending*. As here, the Sixth Circuit second-guessed a district court's determination that the parties did not intend to provide lifetime health insurance benefits. *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368, 374 (S.D. Ohio 1982), rev'd, —— F.2d ——, 120 L.R.R.M. (BNA) 2432 (6th Cir. 1985).

There, the Sixth Circuit adopted, virtually verbatim, the legal analysis of the Court below in this case. Compare 120 L.R.R.M. (BNA) 2434-35 with Pet. App. 5a-8a. But *Kurz-Kasch* was before the Court on summary judgment and the Sixth Circuit—even before trial—decided that the rights were vested both presumptively *and in fact*. The case was remanded with "instructions to enter judgment for plaintiff as to liability." 120 L.R.R.M. (BNA) at 2438-39.

> erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.

456 U.S. at 291.

Accordingly, even assuming that the Court of Appeals' legal presumption is correct, it erred in not remanding the case to the district court to determine the intent of the parties under the appellate court's newly-adopted presumptions. However, as we have shown in Argument I that the district court applied the proper standard of contract interpretation, the appropriate procedure for this Court now is to: (1) grant the petition; (2) summarily vacate the court of appeals decision; and (3) require the Sixth Circuit to reinstate the order of the district court in favor of Powell.

2. *Rule 52(a) And* Anderson v. City of Bessemer City *Prohibit The Courts Of Appeals From Reviewing* De Novo *The District Court's Interpretation Of Documentary As Well As Oral Evidence.*

It is abundantly evident under Rule 52(a) that the clearly erroneous standard applies to "documentary" as well as oral evidence. Thus, the Sixth Circuit erred in construing *de novo* the collective bargaining agreement. Rule 52(a) provides in relevant part:

> . . . Findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . (emphasis added).

The Notes of the Advisory Committee on Rules relating to this section state that the appellate courts are required to defer to a district court's construction of documentary evidence. The Advisory Committee stated:

> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is

> that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. *To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district court in the eyes of litigants, multiply appeals by encouraging appellate trial of some factual issues, and needlessly reallocate judicial authority.*

Federal Civil Judicial Procedure and Rules (West 1985) at 129 (emphasis added).

Anderson v. City of Bessemer City forcefully stated that a court of appeals "oversteps the bounds of its duty under Rule 52" if it "reverse[s] the findings of the trier of fact simply because it is convinced that it would have decided the case differently." 105 S.Ct. at 1511. Thus, "[i]f the district court's account of the evidence is *plausible* in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 1512 (emphasis added). This is so *"even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."* *Id.* (emphasis added).

Under these standards, the Sixth Circuit plainly erred in not deferring to the district court's construction of the contract. Accordingly, the Sixth Circuit's decision should be summarily vacated and the judgment of the district court dismissing the case should be reinstated. At mini-

mum, the Court should grant this petition to determine whether the Court of Appeals violated Rule 52(a). Unless the petition is granted, the salutary principles established by Rule 52(a), *Pullman-Standard* and *Bessemer City* effectively will have lost their force and effect.

CONCLUSION

For the reasons stated in Argument II, it is respectfully submitted that the Court should: (1) grant the petition; (2) summarily vacate the Sixth Circuit's decision; and (3) require the Sixth Circuit to reinstate the order of the district court in favor of Powell.

However, even if the Court does not summarily dispose of this case on the basis of the court of appeal's violation of Rule 52(a), it should grant the petition to decide whether the Sixth Circuit violated Rule 52(a) and also whether it erred in the presumptions it adopted to construe the parties' intent under the collective bargaining agreement.

Respectfully submitted,

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December 30, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3301

JOSEPH POLICY; WILLIAM DRISCOLL; JOHN CHUFO; *et al.*,
Plaintiffs-Appellants,

v.

THE POWELL PRESSED STEEL COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed August 20, 1985

Before: MERRITT and CONTIE, Circuit Judges; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. This is a class action, brought pursuant to section 502(a) of ERISA, 29 U.S.C. § 1132(a), and section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in which plaintiffs, three retired employees of defendant Powell Pressed Steel Company (the Company), seek to compel the Company to resume providing health insurance benefits for certain groups of Company retirees.

Plaintiffs contend that, under the collective bargaining agreement between the Company and the United Steelworkers of America, the Company is obligated to provide health insurance benefits to pensioners and their spouses "during the life of the pensioner." Plaintiffs contend the Company has ceased providing these benefits. Defendant Powell Pressed Steel Co. admits that it has terminated retirees' health insurance benefits, but contends that its obligation to provide health insurance coverage to retirees ended with the August 31, 1982, expiration of the collective bargaining agreement.

In the district court, plaintiffs moved for a preliminary injunction reinstating their benefits. The district court held a hearing and denied plaintiffs' motion on the ground that plaintiffs were not likely to succeed on the merits. The parties agreed to forego a trial; consequently, the district court decided the merits of the case based on the testimony elicited at the preliminary injunction hearing plus supplementary briefs and a deposition. The trial court found that the Company's duty to provide health insurance benefits to retirees had ended with the expiration of the collective bargaining agreement. Therefore, the court entered judgment for the defendant Company without addressing the class certification issue. Because, as a matter of law, we interpret the collective bargaining agreement to unambiguously grant lifetime health insurance benefits to certain retirees, we reverse.

I. Background

The record establishes that beginning in 1964 the collective bargaining agreement between the Company and the union provided that the Company would pay 50% of the cost of its pensioners' benefits supplemental to Medicare. Payment of the remaining 50% was the responsibility of the individual pensioner. In 1966, a new collective bargaining agreement provided that the Company would pay 100% of the cost of the benefits supplemental

to Medicare for pensioners over the age of 65. The 1976 collective bargaining agreement expanded the Company's commitment to include payment of hospitalization and surgical benefits for pensioners between the ages of 62 and 65. Under this agreement, when pensioners reached age 65, the Company became obligated to pay 100% of the cost of their benefits supplemental to Medicare. The 1979 collective bargaining agreement continued both payment of hospitalization and surgical benefits for pensioners between ages 62 and 65 and payment of the cost of benefits supplemental to Medicare for pensioners age 65 and older.

The 1979 collective bargaining agreement was the last ever negotiated between the Company and the union. The Company closed the plant on April 30, 1982, and the collective bargaining agreement betwen the Company and the union expired on August 31, 1982. Subsequent to August 31, 1982, the Company and the union failed to negotiate a new contract, and the plant has remained closed.

The collective bargaining agreement between the Company and the union consisted of four documents: (1) a basic labor agreement; (2) an insurance agreement; (3) a pension agreement; and (4) a supplemental employment agreement. Here we are concerned only with the Insurance Agreement and the Pension Agreement, and passages in both granted certain health insurance benefits to pensioners.

The Insurance Agreement provided in relevant part:

> Section 3. *Despite anything to the contrary herein contained,* present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, *subject to the conditions hereinafter set forth,* receive medicare complementary coverage on their hospitalization and surgical bene-

fits for the pensioner and his spouse, if any, *during the life of the pensioner* at no cost to the pensioner.

In order to be eligible for the above coverage, employees who reach age sixty-five (65) during the term of this contract, or any extension hereof, and become eligible for pension must decide, on or before three (3) months after said employee's sixty-fifth (65th) birthday, whether to retire or continue to work. If the employee continues to work beyond the three (3) month period, he will be deemed to have waived the provisions of this Section 3 and will not thereafter, during the term of this Agreement, receive insurance coverage as herein set forth in this Section 3.

App. 232 (emphasis added). The Insurance Agreement included a general termination clause providing that the Insurance Agreement remained in effect until August 31, 1982. The Insurance Agreement did not require the Company to set up a fund out of which insurance costs were paid. Rather, the health and welfare benefits of both active employees and pensioners were paid by the Company out of its current income. App. 148.

The Pension Agreement provided in relevant part:

Article III, Section 1. Any Employee who, at the time of his retirement on or after February 10, 1979, shall have had at least 10 years continuous service and shall have attained the age of 62 years shall be entitled to receive a pension upon his retirement. The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. *The Company will continue to provide,* at its expense,

> supplemental medicare and major medical benefits for Pensioners aged 65 and over.

App. 236 (emphasis added). Unlike the Insurance Agreement, the Pension Agreement provided that the Company would set up and maintain a pension fund to provide the pensions. App. 257. The Pension Agreement further provided that "[a]ny pension properly payable pursuant to this Agreement shall continue to be payable, *notwithstanding the termination or expiration of this Agreement.*" App. 259 (emphasis added).

The district court found, based on its interpretation of the Insurance and Pension Agreements, that plaintiff-retirees were not entitled to insurance benefits beyond the August 31, 1982, expiration of the collective bargaining agreement. Finding ambiguous section 3 of the Insurance Agreement and Article III, section 1 of the Pension Agreement, the district court looked at the agreements in their entirety and interpreted them as providing for termination of the retirees' health insurance benefits simultaneous with the termination of the collective bargaining agreement. Accordingly, the trial court entered judgment for the Company.

II. Legal Analysis

A. Standard of review

Contract interpretation is a question of law, not subject to the clearly erroneous standard. *Chevron, U.S.A.* v. *Belco Petroleum Corp.*, 755 F.2d 1151, 1153-54 (5th Cir. 1985). Thus, when reviewing the trial court's interpretation of a contract, an appellate court is not limited to the clearly erroneous rule, since a district judge's conclusions of law are freely reviewable by the court of appeals.[1] *Washington [Metropolitan] Area*

[1] Evidence was submitted of the actions of the parties with respect to the health benefits provided by the collective bargaining agreement. The district court, however, construing the agreement within its four corners, concluded that the health insurance benefits

Transit Authority v. *Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980).

B. *Yard-Man's* Guidelines Applied

This court dealt with whether retirees' health insurance benefits continued past the expiration of the collective bargaining agreement in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers (UAW), and Local 134 UAW* v. *Yard-Man Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984). In *Yard-Man*, this court laid out the manner in which a court should proceed when examining the duration of retiree benefits:

> [W]hether retiree insurance benefits continue beyond the expiration of the collective bargaining agreement depends upon the intent of the parties. Clearly the parties to a collective bargaining agreement may provide for rights which will survive termination of their collective bargaining relationship. . . . Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement.
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> * * *
>
> [T]he court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. The court should also interpret each provision in question as part of the integrated whole.

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of the pensioners did not survive the termination of the agreement. In its opinion, the district court did allude to this collateral evidence and, resolving conflicts in the evidence, concluded that the collateral evidence did not support a different result. Even accepting the district court's resolution of the conflicts in this collateral evidence, we still conclude that the collective bargaining agreement unambiguously provides for survival of health insurance benefits. Hence, the decision herein made is one of law to which the clearly erroneous standard of review, Fed. R. Civ. P. 52(a), does not apply.

> If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor law. This is not to say that the collective bargaining agreement should be construed to affirmatively promote any particular policy but rather that the interpretation rendered not denigrate or contradict the basic principles of federal labor law.

Yard-Man, 716 F.2d 1479-80 (citations omitted).[2]

Although *Yard-man* counseled that courts are to look first at the collective bargaining agreement when determining whether the parties intended that retiree benefits continue beyond expiration of the agreement, the court

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[2] In addition to *Yard-Man*, two other Sixth Circuit cases deal with the nature of retiree's health insurance benefits. *See International Union, United Automobile, Aerospace and Agricultural Implement Workers, Local 784* v. *Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984) (affirming the district court's judgment that the employer was obligated to provide health insurance benefits for its retirees without regard to the expiration of the collective bargaining agreement); *Upholsterers' International Union* v. *American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (affirming the trial court's grant of summary judgment for retirees who were challenging the discontinuance of their insurance benefits).

The Ninth Circuit also addressed the issue of retiree insurance benefits. *See Bower* v. *Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984).

also emphasized two factors weighing in favor of finding that retiree benefits survive expiration of the collective bargaining agreement.

First, this court recognized that normally retiree benefits are vested. *Yard-Man*, 716 F.2d at 1482 n.8. This is true because retirees, with respect to their benefits, are unprotected in the collective bargaining process. Upon expiration of a collective bargaining agreement, a union owes no duty to bargain for continued nonvested benefits for retirees. *Yard-Man*, 710 F.2d at 1482. A union may chose to forego non-vested retiree benefits in future negotiations in favor of more compensation for active employees. The union may not, however, "bargain away retiree benefits which have already vested in particular individuals. Such rights, once vested upon an employee's retirement, are interminable and the employer's failure to provide them [is] actionable under § 301 by the retiree." *Id.* at 1482 n.8 (citing *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 181 n.20 (1971). *See also Upholsterers' International Union* v. *American Pad*, 372 F.2d 427, 428 (6th Cir. 1967).

Second, the *Yard-Man* court recognized that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* at 1482.

> Thus, when the parties contract for benefits which accrue upon achievement of retiree status, *there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.*

Id. (emphasis added). *See also Cadillac Malleable Iron Co.*, 728 F.2d 807, 809 (6th Cir. 1984).

III. Collective bargaining agreement not ambiguous

Consistent with *Yard-Man's* guidelines, our review begins with an examination of the Insurance Agreement

and Pension Agreement portions of the collective bargaining agreement. From our study of these agreements, we find that section 3 of the Insurance Agreement, read in its entirety, unambiguously confers lifetime health insurance benefits on Company pensioners. Moreover, we find that Article III, section 1 of the Pension Agreement also provides lifetime health insurance benefits for certain pensioners. Each of these provisions will be discussed separately.

A. Section 3 of the Insurance Agreement unambiguously confers lifetime health insurance benefits on pensioners

The court finds that section 3 of the Insurance Agreement plainly confers lifetime health insurance benefits on covered pensioners.[3] First, the phrase "despite anything to the contrary herein contained" appears to the court to refer to the Insurance Agreement's duration clause's provision terminating the Insurance Agreement as of August 31, 1982. Under this interpretation, a pensioner's health insurance benefits would continue during his life-

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[3] Section 3. *Despite anything to the contrary herein contained,* present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, *subject to the conditions hereinafter set forth,* receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, *during the life of the pensioner* at no cost to the pensioner.

In order to be eligible for the above coverage, employees who reach age sixty-five (65) during the term of this contract, or any extension hereof, and become eligible for pension must decide, on or before three (3) months after said employee's sixty-fifth (65th) birthday, whether to retire or continue to work. If the employee continues to work beyond the three (3) month period, he will be deemed to have waived the provisions of this Section 3 and will not thereafter, during the term of this Agreement, receive insurance coverage as herein set forth in this Section 3.

time despite the duration clause's provision "to the contrary" that the collective bargaining agreement terminated August 31, 1982. Second, the court finds that the phrase "subject to the conditions hereinafter set forth" refers to paragraph 2 of section 3. Paragraph 2 provides that an employee who is eligible for a pension, but who continues to work more than three months past his sixty-fifth birthday, is deemed to have waived the pensioner insurance coverage provided in paragraph 1 of section 3. Thus reading section 3 as a whole, "the conditions hereinafter set forth" are that a pension-eligible employee must choose within three months of his sixty-fifth birthday whether to retire or to continue to work. If he chooses to continue to work, then he has not met the conditions that would have made him eligible for benefits supplemental to Medicare.

Section 3 provides health insurance coverage "for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner." This clearly means that a pensioner will receive health benefits for the remainder of his life, regardless of when the collective bargaining agreement expires, but that a pensioner's spouse is eligible for health benefits only as long as the pensioner lives. In addition to assuring that the pensioner would receive health benefits for life, another reason for including such language in the Insurance Plan is to make clear that, in contrast to pension benefits, a spouse's insurance benefits cease upon the pensioner's death. Under the Pension Agreement, pension benefits could continue to be paid to a retiree's survivor. Our interpretation of the phrase "for the pensioner and his spouse . . . during the life of the pensioner . . ." is consistent with *Yard-Man*. There this court interpreted a similar duration provision which stated "in the event of death of the retiree who is age 65, the Company will continue to insure the surviving spouse and dependent children of the retiree until 6/1/77 [expiration of the col-

lective bargaining agreement]." 716 F.2d at 1481, n.6. The *Yard-Man* court found the most reasonable interpretation to be "that the spouse-dependent child provision was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement." *Id.* at 1481. So here, the limitation of the duration of the spouse's benefits to the life of the pensioner creates an inference that the pensioner's benefits continue for life, not for the remainder of the collective bargaining agreement.

B. Article III, section 1 of Pension Agreement not ambiguous

Article III, section 1 of the Pension Agreement states:

> Any Employee, who at the time of his retirement on or after February 10, 1979, shall have had at least 10 years continuous service and shall have attained the age of 62 years shall be entitled to receive a pension upon his retirement. The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. The Company will continue to provide at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over.

The court finds that this section unambiguously confers the stated health insurance benefits for the duration of the retiree's life. To interpret the section otherwise would render the Company's promise in substantial part nugatory and illusory. For example, if a sixty-two year old employee with twenty years service retired on January 1, 1982, eight months before the collective bargain-

ing agreement expired, and if the Company were correct in contending that the retiree's health insurance benefits ceased with the August 31, 1982, expiration of such agreement, then the Company's promise to provide supplemental Medicare and major medical benefits to the retiree when he reached age sixty-five would be of no value. The court therefore finds that under Article III, section 1 of the Pension Agreement retiree health benefits survive expiration of the collective bargaining agreement.

The district court, however, went beyond these two contract provisions and read into other portions of the collective bargaining agreement the intent not to confer lifetime health benefits on retirees.

IV. Bases of the district court's interpretation

A. Funding of pension benefits vs. non-funding of insurance benefits

In the case at bar, the Pension Agreement established a pension fund as a means of insuring that pension benefits would be paid regardless of future contingencies. In contrast, the Insurance Agreement did not provide a mechanism for funding pensioners' health insurance benefits. The district court inferred from the Pension Agreement's provision for funding pension benefits and from the Insurance Agreement's failure to fund health benefits that, if the parties had intended that the health insurance benefits survive the expiration of the collective bargaining agreement, then the parties would have provided for a health insurance *fund*. This appears to us to be a meager basis for overriding the clear meaning of section 3 of the Insurance Agreement and of Article III, section 1 of the Pension Agreement. In any event, the district court's inference is in conflict with *Yard-Man*. In *Yard-Man*, as in this case, the pension plan was funded while the insurance plan was not funded, and the *Yard-Man* court found that the failure to provide a mechanism for

funding retiree health benefits "does not necessarily imply that retiree benefits were not intended to survive the [collective bargaining] agreement." *Id.* at 1482 n.7. The *Yard-Man* court went on to hold, of course, that retirees' health benefits "were intended to outlive the collective bargaining agreement's life." *Id.* at 1482-83.

B. Failure to include express continuation clause in Insurance Agreement

The collective bargaining agreement explicitly provided that *pension* benefits would "continue to be payable, notwithstanding the termination or expiration" of the collective bargaining agreement; but no similar provision was made concerning *health insurance* benefits. The district court focused on this clause continuing pension benefits past the expiration of the collective bargaining agreement, and the court inferred that the absence of a similar duration clause applicable to insurance benefits meant that the parties did not intend the insurance benefits to survive the collective bargaining agreement. This inference would be quite plausible if the Insurance Agreement did not expressly provide for lifetime health insurance benefits for retirees. Moreover, drawing this inference is somewhat in conflict with this court's reasoning in *Yard-Man*. As heretofore stated, the *Yard-Man* collective bargaining agreement expressly provided a method for continuing pension benefits past the expiration of the collective bargaining agreement, but the agreement failed to make similar provision for health benefits. Yet, this court still found that the parties intended the health insurance benefits to survive expiration of the collective bargaining agreement. 716 F.2d at 1482 n.7.

C. Ambiguity of "during the life of the pensioner"

The district court indicated that the words in section 3 of the Insurance Agreement "will . . . receive medicare

complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner" were ambiguous. The court inferred that the words "during the life of the pensioner" were inserted only to make clear that the spouse would receive benefits during the pensioner's life, not to grant lifetime benefits to the pensioner. Thus, the sole effect of the phrase "during the life of the pensioner" would be to limit the spouse's right to benefits to the life of the pensioner. This interpretation does not make sense, because if it were correct, then it would follow that the phrase "at no cost to the pensioner" would likewise only apply to the spouse, with the anomalous result that benefits to the spouse would be without cost but the pensioner would be required to pay for the pensioner's benefits.

D. Vested nature of retiree benefits

This court has recognized, as stated, that retiree benefits normally vest as a matter of course upon an employee's retirement and are interminable. *Yard-Man*, 716 F.2d at 1482 n.8. The district court failed to give effect to this proposition.

E. Status nature of retirees' benefits

Finally, the district court failed to give effect to this court's admonition that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* at 1482. *See also Cadillac Malleable Iron Co.*, 728 F.2d at 809. Plaintiff retirees are entitled to the inference on their behalf that the Company and the union intended the health insurance benefits to continue as long as the retirees remained retired. *Yard-Man*, 716 F.2d at 1482.

We therefore conclude that the clear meaning of section 3 of the Insurance Agreement and Article III, sec-

tion 1 of the Pension Agreement is neither rendered ambiguous nor overriden (sic) by the other provisions of these agreements relied on by the district judge.

V. Other claims

Plaintiffs asserted two other bases for relief. The first claim was brought pursuant to ERISA; plaintiffs basically contended that when a collective bargaining agreement is ambiguous, ERISA's public policy of protecting employee benefit plans creates a strong presumption that the parties intended retiree insurance benefits to continue past the expiration of the agreement. The second claim was based on an estoppel argument that because Company officials told retiring employees that they would receive lifetime health insurance benefits, the Company was estopped to deny coverage under the collective bargaining agreement. In view of our preceding analysis of the collective bargaining agreement and the result we reached, we decline to address these two issues.

VI. Eligibility of "70/80 retirees" for health insurance benefits

In the foregoing analysis we have found that certain pensioners are granted lifetime health insurance benefits under Article III, section 1 of the Pension Agreement. Nevertheless, the Company contends that a particular group of retirees, termed "70/80 retirees," are not eligible for health insurance benefits. Since plaintiff William Driscoll is a 70/80 retiree, we address the issue whether 70/80 retirees are eligible for lifetime health insurance benefits.[4]

Article III of the Pension Agreement is entitled "Eligibility Requirements" and is divided into four sections,

[4] Since the district court determined that no retirees were entitled to health benefits past the expiration of the collective bargaining agreement, it did not address the Company's separate defense with respect to 70/80 retirees.

each of which deals with a different category of potential retirees. The 70/80 retirees are defined in section 4 of Article III, as follows:

> 4. Any participant who shall have had at least 15 years continuous service and (i) shall have attained the age of 55 years and whose combined age and years of continuous service shall equal 70 or more or (ii) whose age and years of continuous service shall equal 80 or more, and
>
> (a) whose continuous service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof or by reason of a layoff or physical disability,
>
> * * *
>
> shall be eligible to retire on or after September 1, 1979 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension.

Section 4, dealing with 70/80 retirees, makes no reference to health insurance benefits. According to the Company, this is evidence of the parties' intent that only section 1 pensioners receive health insurance benefits. According to the Company, prior to the plant shutdown there had never been any 70/80 retirees and therefore the Company has never provided health insurance benefits for 70/80 retirees. The Company argues that even if the court is correct in finding that the other group of pensioners is entitled to lifetime health insurance benefits, 70/80 retirees are not eligible for these benefits because their rights are governed by Article III, section 4 of the Pension Agreement, rather than by Article III, section 1. We find, however, that this is too narrow a reading of the Pension Agreement and hold that the Pension Agreement read as a whole grants health insurance benefits to 70/80 retirees.

In determining that 70/80 retirees are entitled to health insurance benefits, we first look to section 1 of

Article III of the Pension Agreement, which states in pertinent part:

> The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for *any Employee* who retires after September 1, 1979, prior to reaching age 65. When said *Pensioner* reaches age 65, the Company will provide such *Pensioner*, at the Company's expense, supplemental medicare and major medical benefits. The Company will continue to provide, at its expense, supplemental medicare and major medical benefits for *Pensioners* aged 65 and over.

App. 236 (emphasis added). Thus, section 1 provides that the Company will grant certain health insurance benefits to "*any* Employee who retires after September 1, 1979, prior to reaching age 65." Nothing in the Pension Agreement limits the health insurance benefits conferred in Article III, section 1 to employees who retire after reaching age sixty-two. Rather, section 1's broad grant of health insurance benefits to "any" employee who retires before reaching age 65 applies equally to 70/80 retirees. Moreover, the Pension Agreement defines "pensioner" as "any person who is retired from employment with the Company and is receiving or is eligible to receive a pension under the terms of this Plan." A 70/80 retiree is eligible for a pension under the terms of Article III, section 4; thus a 70/80 retiree is a "pensioner" under the Pension Agreement. This is significant because section 1 of Article III confers health insurance benefits on "pensioners" and does not distinguish between 70/80 pensioners and other pensioners. Since 70/80 retirees are pensioners within the definition of the Pension Agreement, the court finds they are intended to be recipients of this health insurance coverage. We believe the Company's interpretation of the Pension Agreement, which would exclude 70/80 retirees from eligibility for health

insurance benefits, is contrary to both the spirit and the plain meaning of the collective bargaining agreement.

The Company also contends that, since Driscoll applied to retire in July, 1982, after the plant had closed in April, 1982, Driscoll was no longer an "employee" when he "retired," and therefore he is not eligible for retiree insurance benefits. In making this argument, the Company relies on this circuit's decision in *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972).

Having considered the *Schneider* case, we hold that it has no application to the situation presented here. First, the *Schneider* court was not only construing a different collective bargaining contract between the parties before it; the court was dealing with a specific factual and contractual situation and was not setting out general legal propositions that would govern the situation before us. We must be guided by the collective bargaining agreement negotiated between the parties involved. Having considered the agreement between the Company and the union, we find that the terms of their collective bargaining agreement demonstrate that the parties contemplated that long-time employees faced with a permanent plant shutdown would have the option of retiring. It appears to the court that the major purpose of 70/80 retirement is to allow such employees, ordinarily not eligible for retirement, to retire when faced with permanent shutdown of the plant. The Company's argument that after the plant shutdown the employees were no longer "employees" and thus could not "retire" would render nugatory the provision for 70/80 retirement, which by definition can occur only when there is a permanent plant shutdown or layoff.

VII. Conclusion

With regard to plaintiff Chufo, who retired in 1977 because of a disability, we remand his claim to the dis-

trict court with instructions to dismiss his claim with prejudice in light of his abandoning his claim at oral argument before this court.

With regard to plaintiffs Policy and Driscoll, we hold as a matter of law that the health insurance benefits granted plaintiffs Policy and Driscoll survived expiration of the collective bargaining agreement between Powell Pressed Steel Company and the United Steelworkers. We vacate the trial court's grant of judgment in favor of defendant Powell Pressed Steel Company and remand the action for further proceedings consistent with this opinion, including entertainment of plaintiffs' motion for class certification and consideration of the issue of damages.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C82-2402Y

Judge John M. Manos

JOSEPH POLICY, *et al.*,
Plaintiffs,

v.

THE POWELL PRESSED STEEL COMPANY,
Defendant.

[Filed March 14, 1984]

MEMORANDUM OF OPINION

On September 7, 1982, plaintiffs, Joseph Policy, William Driscoll, and John Chufo, filed the above-captioned case against defendant, The Powell Pressed Steel Co. (the Company). This class action concerns the Company's termination of health insurance benefits for pensioners following the expiration of its three-year collective bargaining agreements [1] with the United Steelworkers of America (Steelworkers) on August 31, 1982. On April 30, 1982, the Company ceased all operations at its steel manufacturing facility in Hubbard, Ohio, and no new collec-

[1] The collective bargaining agreements between the Company and the Steelworkers consist of four documents: (1) a basic labor agreement, (2) an insurance agreement, (3) a pension agreement, and (4) a supplemental unemployment agreement.

tive bargaining agreements were ever negotiated. The plaintiffs contend that the pension and insurance agreements, signed by the Company and the Steelworkers in 1979, entitle them to health insurance benefits for life, notwithstanding the termination of the two agreements. This court has jurisdiction under section 502(a) of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a),[2] and section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. On September 24, 1982, the court held a hearing on plaintiffs' motion for a preliminary injunction,[3] and on October 18, 1982, the court issued a Memorandum of Opinion and Order denying that motion.[4] Instead of pro-

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[2] 29 U.S.C. § 1132(a) provides in pertinent part:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) of this title;

[3] On September 7, 1982, this court issued a temporary restraining order pending a hearing on plaintiffs' motion for a preliminary injunction.

[4] In their motion for a preliminary injunction plaintiffs sought to continue the health insurance benefits contained in the pension and insurance agreements that expired on August 31, 1982.

ceeding with a trial on the merits, however, the parties have agreed to have the court decide this action upon the evidence already received in connection with the motion for a preliminary injunction, supplemented by a deposition and briefs from counsel. *See* Fed. R. Civ. P. 65 (a) (2).[5]

Upon consideration of the testimony of the witnesses and the deponent, the exhibits received, and the briefs submitted by counsel, the court finds that the plaintiffs are not entitled to health insurance benefits beyond the expiration of the collective bargaining agreement on August 31, 1982. Accordingly, the court enters judgment for the defendant. The following findings of fact and conclusions of law are filed pursuant to Fed. R. Civ. P. 52(a).

Plaintiffs maintain that they have a vested right to the health insurance benefits provided for in the 1979 pension and insurance agreements. They make two arguments. First, they contend that the terms of the agreements themselves guarantee health insurance benefits "during the life of the pensioner." Second, plaintiffs make an estoppel argument, namely, that they retired with a reliance on the Company's promise to pay their health insurance benefits for life. The Company responds with

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[5] Fed. R. Civ. P. 65(a) (2) provides:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. *Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.* This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(Emphasis added). Although plaintiffs' complaint contained a demand for a jury trial, that demand was withdrawn with the consent of all parties on January 24, 1984. *See* Fed. R. Civ. P. 38(d).

several arguments. It argues that a plain reading of the agreements suggests that the benefits continued "during the life of the pensioner," but only *for the life of the agreements*, all of which expired on August 31, 1982. The Company contends that all of its actions were consistent with such a plain reading of the agreements, and, furthermore, the only way these benefits could become "vested" is if the agreements themselves so provided.

1. *The Relevant Contract Provisions*

The relevant provisions of the 1979 Insurance and Pension Agreements are as follows. Section 3 of the Insurance Agreement provides in part: [6]

> Despite anything to the contrary herein contained, present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, subject to the conditions hereinafter set forth, receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, *during the life of the pensioner* at no cost to the pensioner.

Section 8 of the Insurance agreement provides: [7]

> This Agreement shall become effective on September 1, 1979, and shall remain in effect until midnight, August 31, 1982.

Article III, Section 1, of the Pension Agreement provides: [8]

> Any Employee who, at the time of his retirement on or after February 10, 1979, shall have had at least 10 years continuous service and shall have attained the age of 62 years shall be entitled to receive a

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[6] Joint Exhibit 1, at 3. (Emphasis added).

[7] Joint Exhibit 1, at 4.

[8] Joint Exhibit 11, at 2A. (Emphasis added).

> pension upon his retirement. The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. *The Company will continue to provide*, at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over.

Article IX of the Pension Agreement, entitled "Financing and Pension Trust," provides in part: [9]

> The Company intends to and will make such contributions to the Pension Fund for the purpose of providing pensions under this Agreement as shall be required under accepted actuarial principles (including the amortization of past service on a thirty year basis) to maintain the Pension Fund in a sound condition and shall pay for the expenses incident to the operation of the Fund. No employee shall be required to contribute to the Fund.

Article X, Section 7, of the Pension Agreement provides: [10]

> Any pension properly payable pursuant to this Agreement shall continue to be payable, *notwithstanding the termination or expiration of this Agreement.*

Article X, Section 9, of the Pension Agreement provides: [11]

> This Agreement shall become effective as of September 1, 1979, and shall expire at midnight, August 31, 1982.

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[9] Joint Exhibit 11, at 23.

[10] Joint Exhibit 11, at 25. (Emphasis added).

[11] Joint Exhibit 11, at 26.

2. *Plaintiffs' Claim Based Upon the Agreements*

Plaintiffs contend that the words "during the life of the pensioner" and "will continue to provide" indicate that the health insurance benefits should survive the expiration of agreements themselves. Plaintiffs rely primarily upon *Upholsters'* (sic) *International Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967), *aff'g. Upholsters* (sic) *International Union v. American Pad & Textile Co.*, 263 F. Supp. 765 (S.D. Ohio 1965), and *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1002 (1984). In *American Pad*, the union sued the employer for breach of an agreement to provide life insurance for retired employees. The agreement in that case provided in pertinent part:

> 2. It is further agreed that . . . the Company will continue to cover such eligible retired employees with $2,000 life insurance.

372 F.2d at 427. The Court of Appeals held that the use of the word "continue" with respect to the company's obligation was ambiguous, since it could be construed as meaning either "for the term of the contract" or "for the life of the retiree." The court opted for the second construction, because the preceding provision of the same agreement expressly limited itself to the "duration of the current Collective Bargaining Agreement." 372 F.2d at 428.[12] In affirming the district court's holding that the

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[12] The preceding provision contained the following language:

> 1. It is agreed that the "Factory Group Insurance Plan" for: the employees for Life, Accidental Death and Dismemberment, and Weekly Benefits; the employees and dependents for Hospital Expense, Surgical Expense and Medical Expense; as are now in effect and are outlined in the booklet attached, such "Factory Group Plan" shall continue in full force and

life insurance benefits were to continue "for the life of the retiree," the Sixth Circuit stated:

> We believe that the word "continue" in the second paragraph of the key contract provisions is ambiguous. It should, however, be read with the whole of the supplementary agreement, including the first paragraph, which clearly made use of language limiting that paragraph to the term of the contractual agreement. The fact that this language was significantly used in the first paragraph and was not employed in relation to the second paragraph lends weight in our view to the interpretation placed on the contract by Judge Peck.

372 F.2d at 428.

In *Yard-Man*, the union sued the employer for breach of a 1974 collective bargaining agreement to provide life and health insurance benefits for retired employees. This agreement bore an expiration date of June 1, 1977; however, less than a year after the agreement was signed the plan was shut down. The district court, relying solely upon the language of the collective bargaining agreement,[13] found that Yard-Man breached the agreement when it cancelled the retirees' insurance benefits as of June 1, 1977. The Sixth Circuit Court of Appeals affirmed, concluding that the parties intended to create lifelong vested insurance benefits for the Yard-Man retirees. The key provision of the collective bargaining agreement in *Yard-Man* was as follows:

> When the former employee has attained the age of 65 years then:

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effect *for the duration of the current Collective Bargaining Agreement.*

372 F.2d at 428, n. 3. (Emphasis added).

[13] *See Yard-Man, supra*, 716 F.2d at 1480 n.1.

> (1) *The Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse.*

(Emphasis added). Under another provision of the agreement, active employee benefits expressly terminated one month after an employee's "layoff." Thus, the benefits of all active employees terminated one month after the plant was closed. Yard-Man argued that since the retirees' benefits were defined as "equal to the active group," those benefits must be equivalent in all respects *including duration*. Both the district court and the Sixth Circuit rejected this argument. The Sixth Circuit reasoned:

> We agree with the District Court that the key provision of the collective bargaining agreement is ambiguous. The language "will provide insurance benefits equal to the active group" could reasonably be construed, if read in isolation, as either solely a reference to the nature of retiree benefits or as an incorporation of some durational limitation as well. This phrase is no less ambiguous as to intended duration than language construed as creating continuing benefits in the various cases and arbitration decisions cited by the parties. . . .
>
> This ambiguity requires that we look to other provisions of the collective bargaining agreement for evidence of intent and an interpretation which is harmonious with the entire document. This examination persuades us that Yard-Man and the Union intended to create vesting insurance benefits in the Yard-Man retirees which continue beyond the life of the collective bargaining agreement.

716 F.2d at 1480-81 (citations and footnote omitted).

Both *Yard-Man* and *American Pad* stand for the proposition that courts must first look to the intent of the parties to determine whether retirees' insurance benefits continue beyond expiration of a collective bargaining

agreement. *Yard-Man*, *supra*, 716 F.2d at 1479-80; *American Pad*, *supra*. *Accord International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. Roblin Industries, Inc.*, 561 F. Supp. 288 (W.D. Mich. 1983); *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982). In *Yard-Man*, the Sixth Circuit offered a number of basic contract principles for discerning the parties' intent in collective bargaining agreements.

> For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. . . . The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. . . . The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. . . . As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. . . . Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. . . . Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy. This is not to say that the collective bargaining agreement should be construed to affirmatively promote any particular policy but rather that the interpretation rendered not denigrate or contradict basic principles of federal labor law.

716 F.2d at 1479-80 (citations omitted). *Accord Rublin* (sic) *Industries, supra*, 561 F. Supp. at 298-300; *Metal Polishers v. Kurz-Kasch, supra*, 538 F. Supp. at 372-73.

In the present case, the relevant provisions of the Insurance Agreement are ambiguous. Section 3 of the Insurance Agreement provides: [14]

> *Despite anything to the contrary herein contained*, present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to the date will, *subject to the conditions hereinafter set forth*, receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner.

From this language, it is unclear whether the termination of the agreement in Section 8 supercedes this provision through the terms, "subject to the conditions hereinafter set forth," or whether Section 8 is itself superceded by the language, "Despite anything to the contrary herein contained." In addition, it is unclear whether the phrase, "during the life of the pensioner," was intended to give the pensioner health insurance benefits *for life*, or whether it simply meant that *spouses* would only receive benefits "*during the life of the pensioner.*"

The Sixth Circuit Court of Appeals, when confronted with a similar ambiguity in *American Pad*, looked to the remainder of the agreement to select the appropriate interpretation. 372 F.2d at 428. *Accord, Yard-Man, supra*, 716 F.2d at 1480; *Roblin Industries, supra*, 561 F. Supp. at 298; *Metal Polishers v. Kurz-Kasch, supra*, 538 F. Supp. at 372-73. In *American Pad*, the court noted that the provision preceding the one in question expressly limited itself to the "duration of the current Collective Bar-

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[14] Joint Exhibit 1, at 3. (Emphasis added).

gaining Agreement." Since the drafters undoubtedly knew how to limit other provisions to the term of the agreement, the court reasoned that the failure to limit the provision in question indicated that it was to continue beyond the termination of the agreement. 372 F.2d at 428.

In the present case, the court looks to the 1979 Pension Agreement to resolve the current ambiguities over plaintiffs' health insurance benefits. Article X, Section 7, of the Pension Agreement indicates that parties clearly knew how to draft a provision that would continue beyond the termination of the agreement. Article X, Section 7, contains the following unambiguous language: [15]

> Any pension properly payable pursuant to this Agreement shall continue to be payable, *notwithstanding the termination or expiration of this Agreement.*

Neither the Insurance Agreement nor the Pension Agreement contains this type of unambiguous provision for plaintiffs' health insurance benefits. Moreover, in Article IX of the Pension Agreement the Company expressly agreed to provide and maintain a separate "Pension Fund" [16] so that retirees would receive their pensions even if the Company ceased operating. No such provisions were made with respect to health insurance benefits. Thus, following the reasoning of *American Pad*, the court finds the agreements in this case support the Company's construction that plaintiffs' health insurance benefits expired on August 31, 1982.

This result is also consistent with the principles enunciated by the Sixth Circuit in *Yard-Man*. *See* 716 F.2d at 1479-80. As the Sixth Circuit indicated in *Yard-Man*: "Variations in language used in other durational provisions of the agreement may . . . provide inferences of in-

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[15] Joint Exhibit 11, at 25. (Emphasis added).

[16] Joint Exhibit 1, at 3. (Emphasis added).

tent useful in clarifying a provision whose intended duration is ambiguous." 716 F.2d at 1480 (citations omitted). By holding that the retirees' insurance benefits expire with the end of the collective bargaining agreements, this court interprets the provision in question in a manner that is harmonious with the entire set of agreements. Furthermore, the agreement to provide benefits to a pensioner and his spouse during the life of that pensioner, but only for the duration of the collective bargaining agreement, is by no means an illusory promise. Indeed, this provision is similar to an annual insurance policy that provides real benefits for the duration of the policy, but whose benefits terminate with the expiration of the policy unless renewed in a subsequent agreement. Finally, this interpretation does not contravene federal labor policy. As the Sixth Circuit noted in *Yard-Man*:

> [N]o federal policy identified to this Court presumptively favor[s] the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent.

716 F.2d at 1482.

When the terms of an agreement are ambiguous, courts may look to the actions of the parties during the course of performance to resolve any ambiguities. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 161, 87 S. Ct. 369, 371 (1966); *Roblin Industries, supra*, 561 F. Supp. at 300. *See also*: *Yard-Man, supra*, 716 F.2d at 1481 & n.5 While the court believes that it is unnecesary to look at the actions of the parties to interpret the agreements in the present case, such actions provide additional support for the Company's interpretation.

For example, plaintiffs place great weight in the fact that the Company provided health insurance benefits for pensioners during a 1979 strike, when all agreements between the Company and the Steelworkers had expired.

However, C. A. Covington, Secretary of the Company and a member of its Board of Directors, testified that the Staff Representative of the Steelworkers, Kenneth Williams, asked him to continue these benefits to pensioners during the strike. Mr. Williams testified that he never made such a request; however, Mr. Covington testified that the Company granted Mr. Williams's request solely as a goodwill gesture, since many of the striking employees had relatives who were pensioners. The court finds Mr. Covington's testimony on this matter more credible than that of Mr. Williams.

Plaintiffs also rely on the testimony of Eli Moga, Personnel Manager of the Company. Mr. Moga testified that he told the retirees the insurance and pension agreements provided them with health insurance benefits *for life*; however, Mr. Moga's testimony is equally consistent with the Company's view that pensioners would receive the benefits for life, *subject to the expiration of the agreements.* Moreover, unlike the situation in *Yard-Man*, the Company's actions in this case are consistent with its interpretation of the collective bargaining agreements. In *Yard-Man*, the company undermined its position that retiree benefits were tied to the benefits of existing employees when it continued to provide benefits for retirees long after it had terminated the benefits for its employees who were laid-off. *See* 716 F.2d at 1481 & n.5. In the present case, however, the Company's decision to provide benefits until the expiration of the collective bargaining agreements is consistent with the Company's interpretation that the retirees' health insurance benefits expired with the end of the collective bargaining agreements.[17]

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[17] Even the Steelworkers' actions are consistent with the Company's view that retirees' insurance benefits are not vested, since the series of agreements between the Steelworkers and the Company show plainly that the benefits of retirees have changed over the years in form and amount and that the Steelworkers have negotiated these changes. Moreover, in none of the agreements have the Steelworkers indicated that retiree insurance benefits are in any way vested or exempt from renegotiation.

Another action that weighs against the plaintiffs' position is the Steelworkers' failure to insist that the Company fund these benefits. If the Steelworkers expected the health insurance benefits to continue even after the Company ceased operating, they should have insisted that the Company fund the insurance benefits, as it did with the pensions. Thus, both the terms of the agreements and the actions of the parties support the Company's position that the retirees' health insurance benefits expired on August 31, 1982.

3. *Plaintiffs' Claim Not Based Upon the Agreements*

Plaintiffs also make a second claim, in the nature of estoppel, that goes beyond the agreements themselves. Plaintiffs claim they have a vested right to the health insurance benefits because they retired with a reliance on the Company's promise to pay these benefits "for life." In a case involving similar facts, Chief Judge Rubin of the Southern District of Ohio held that the "vesting" of health insurance benefits for retirees depends solely upon the terms of the Collective Bargaining Agreement. *Metal Polishers Local No. 11 v. Kurz-Kasch*, 538 F. Supp. 368 (S.D. Ohio 1982).[18] The Chief Judge stated:

> The Court has been unable to locate any federal decision which addresses the issue of whether benefits provided to retirees under a Collective Bargaining Agreement may become "vested" despite evidence

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[18] In *Metal Polishers*, the Collective Bargaining Agreement between the union and the employer expired on September 15, 1975, and the union went on strike. Two months later, the company decided to close the plant permanently. At issue in the case were group life and health insurance policies for the company's retirees. The retirees argued that these benefits were "vested," notwithstanding the termination of the Collective Bargaining Agreement. The court held that these benefits were not vested, but rather, they terminated when the underlying agreement expired.

of a contrary intent under the terms of the Agreement. On the contrary, the cases arising out of the federal courts which have dealt with the issue of whether health or life insurance benefits for retirees are "vested", have been decided solely under the terms of the Collective Bargaining Agreement or other contractual means providing for such benefits. *Turner v. Teamsters*, Local 302, 604 F.2d 1219, 1225 (9th Cir. 1979); *United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO v. Lee National Corp.*, 323 F.Supp. 1181, 1188 (S.D. N.Y. 1971).

538 F. Supp. at 374. The Chief Judge then concluded:

Based on the facts of this case, the Court declines to find that the defendant is under an implied obligation arising out of the employment relationship to continue to pay the premiums for retirees on the insurance policies provided for in the Collective Bargaining Agreement. . . .

. . . .

The Court understands that many of the retirees in this case may have relied upon the defendant's provision of these insurance benefits and contemplated their continuation for the remainder of their lives. The Court also notes that they had no part in the Union's decision to strike in September of 1975. The fact, however, is undisputed that these benefits were only provided under Collective Bargaining Agreements with specific termination dates. . . .

The Court has already determined that there is no evidence of an intention on the part of the Union or the employer to establish such vested rights on behalf of the retired employees. In the absence thereof, an implied obligation to provide

such unanticipated insurance coverage for retired employees should not be imposed.

538 F. Supp. at 374-75.[19] *Accord Yard-Man, supra*, 716 F.2d at 1479 ("Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement.").

In the present case, since the terms of the agreements directly contravene plaintiffs' claim that the benefits are vested, and since the actions of the parties further support the Company's position that the retirees' insurance benefits expired on August 31, 1982, the court finds that plaintiffs' estoppel argument is without merit.

Accordingly, the court enters judgment for the defendant.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

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[19] The Chief Judge emphasized the distinction between pension plans and life and health insurance benefits. He stated:

> It is important to note that this case does not involve the retirees vested interest in a pension. The concern over the lack of employee protection in retirement plans prompted Congress to enact the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* in 1974. The statutory vesting requirements contained in ERISA, however, apply only to pension plans and not to health and life insurance benefits. 29 U.S.C. § 1051(1).

538 F. Supp. at 374. *See also*: *Turner v. Teamsters, Local 302*, 604 F.2d 1219, 1225 (9th Cir. 1979):

> Pensions are paid from an actuarily predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid from a fund consisting of employer contributions and last only the life of the collective bargaining agreement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C82-2402Y

Judge John M. Manos

JOSEPH POLICY, *et al.*,
Plaintiffs,

v.

THE POWELL PRESSED STEEL COMPANY,
Defendant.

[Filed October 18, 1982]

MEMORANDUM OF OPINION

On September 7, 1982, plaintiffs, Joseph Policy, William Driscoll, and John Chufo, filed a complaint against defendant, The Powell Pressed Steel Co. (the Company). This class action concerns the Company's termination of health insurance benefits for pensioners following the expiration of its three-year collective bargaining agreements [1] with the United Steelworkers of America (Steelworkers) on August 31, 1982. On April 30, 1982, the Company ceased all operations at its steel manufacturing

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[1] The collective bargaining agreements between the Company and the Steelworkers consist of four documents: (1) a basic labor agreement, (2) an insurance agreement, (3) a pension agreement, and (4) a supplemental unemployment agreement.

facility in Hubbard, Ohio, and no new collective bargaining agreements were ever negotiated. The plaintiffs contend that the pension and insurance agreements, signed by the Company and the Steelworkers in 1979, entitle them to health insurance benefits for life, notwithstanding the termination of the two agreements. This court has jurisdiction under section 502(a) of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a),[2] and section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. The case is currently before this court on plaintiff's motion for a preliminary injunction.[3]

Plaintiffs' motion for a preliminary injunction seeks to continue the health insurance benefits contained in the

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[2] 29 U.S.C. § 1132(a) provides in pertinent part:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) of this title;

[3] On September 7, 1982, this court issued a temporary restraining order pending a hearing on plaintiffs' motion for a preliminary injunction.

pension and insurance agreements that expired on August 31, 1982. The standards for the granting of injunctive relief are set forth in *North Avondale Neighborhood Association v. Cincinnati Metropolitan Housing Authority*, 464 F.2d 486 (6th Cir. 1972) (per curiam).

> 1) Has petitioner made a strong showing of probable success at trial?
>
> 2) Has petitioner shown irreparable injury?
>
> 3) Would issuance of the preliminary injunction cause substantial harm to others?
>
> 4) Where lies the public interest?

464 F.2d at 488 (citations omitted). *Accord, Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 369 (6th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1490 (1982); *Mason County Medical Association v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). Since the court finds that plaintiffs are unlikely to succeed at trial, it is unnecessary to consider whether they have met the remaining requirements of *North Avondale*.

In order for the court to grant a preliminary injunction in the present case, plaintiffs must make "a strong showing of probable success at trial." *North Avondale*, 464 F.2d at 488.[4] Plaintiffs contend that they have a vested right to the health insurance benefits provided for in the 1979 pension and insurance agreements. The plaintiffs make two arguments. First, plaintiffs contend that the terms of the agreements themselves guarantee health insurance benefits "during the life of the pensioner." Second, plaintiffs make an estoppel argument,

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[4] Plaintiffs cannot simply show a "possibility" of success. "A showing of a mere 'possibility' of success would render the test for a preliminary injunction virtually meaningless. Therefore, we reiterate that the plaintiffs must demonstrate a strong or substantial likelihood or *probability* of success on the merits." (Emphasis in original).

namely, that they retired with a reliance on the Company's promise to pay their health insurance benefits for life. The Company responds with several arguments. They argue that a plain reading of the agreements suggests that the benefits continued "during the life of the pensioner," but only *for the life of the agreements*, all of which expired on August 31, 1982. The Company contends that all of its actions were consistent with such a plain reading of the agreement, and, furthermore, the only way these benefits could become "vested" is if the agreements themselves so provided.

1. *The Relevant Contract Provisions*

The relevant provisions of the 1979 Insurance and Pension Agreements are as follows. Section 3 of the Insurance Agreement provides in part:[5]

> Despite anything to the contrary herein contained, present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, subject to the conditions hereinafter set forth, receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, *during the life of the pensioner* at no cost to the pensioner.

Section 8 of the Insurance agreement provides: [6]

> This Agreement shall become effective on September 1, 1979, and shall remain in effect until midnight, August 31, 1982.

Article III, Section 1, of the Pension Agreement provides: [7]

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[5] Joint Exhibit 1, at 3. (Emphasis added).

[6] Joint Exhibit 1, at 4.

[7] Joint Exhibit 11, at 2A. (Emphasis added).

> Any Employee who, at the time of his retirement on or after February 10, 1979, shall have had at least 10 years continuous service and shall have attained the age of 62 years shall be entitled to receive a pension upon his retirement. The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. *The Company will continue to provide*, at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over.

Article IX of the Pension Agreement, entitled "Financing and Pension Trust," provides in part: [8]

> The Company intends to and will make such contributions to the Pension Fund for the purpose of providing pensions under this Agreement as shall be required under accepted actuarial principles (including the amortization of past service on a thirty year basis) to maintain the Pension Fund in a sound condition and shall pay for the expenses incident to the operation of the Fund. No employee shall be required to contribute to the Fund.

Article X, Section 7, of the Pension Agreement provides: [9]

> Any pension properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement.

Article X, Section 9, of the Pension Agreement provides: [10]

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[8] Joint Exhibit 11, at 23.

[9] Joint Exhibit 11, at 25.

[10] Joint Exhibit 11, at 26.

> This Agreement shall become effective as of September 1, 1979, and shall expire at midnight, August 31, 1982.

2. *Plaintiffs' Claim Based Upon the Agreements*

Plaintiffs contend that the words "during the life of the pensioner" and "will continue to provide" indicate that the health insurance benefits should survive the expiration of agreements themselves. Plaintiffs rely heavily upon *Upholsters'* (sic) *International Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967), *aff'g.*, *Upholsters'* (sic) *International Union v. American Pad & Textile Co.*, 263 F. Supp. 765 (S.D. Ohio 1965). In *American Pad*, the union sued the employer for breach of an agreement to provide life insurance for retired employees. The agreement in that case provided in pertinent part:

> 2. It is further agreed that . . . the Company will continue to cover such eligible retired employees with $2,000 life insurance.

372 F.2d at 427. The Court of Appeals held that the use of the word "continue" with respect to the company's obligation was ambiguous, since it could be construed as meaning either "for the term of the contract" or "for the life of the retiree." The court opted for the second construction, because the preceding provision of the same agreement expressly limited itself to the "duration of the current Collective Bargaining Agreement." 372 F.2d at 428.[11] In affirming the district court's holding that the

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[11] The preceding provision contained the following language:

> 1. It is agreed that the "Factory Group Insurance Plan" for: the employees for Life, Accidental Death and Dismemberment, and Weekly Benefits; the employees and dependents for Hospital Expense, Surgical Expense and Medical Expense; as are now in effect and are outlined in the booklet attached, such "Factory Group Plan" shall continue in full force and effect *for the duration of the current Collective Bargaining Agreement.*

372 F.2d at 428, n. 3. (Emphasis added).

life insurance benefits were to continue "for the life of the retiree," the Sixth Circuit stated:

> We believe that the word "continue" in the second paragraph of the key contract provisions is ambiguous. It should, however, be read with the whole of the supplementary agreement, including the first paragraph, which clearly made use of language limiting that paragraph to the term of the contractual agreement. The fact that this language was significantly used in the first paragraph and was not employed in relation to the second paragraph lends weight in our view to the interpretation placed on the contract by Judge Peck.

372 F. 2d at 428.

In the instant case, the relevant provisions of the Insurance Agreement are ambiguous. Section 3 of the Insurance Agreement provides: [12]

> *Despite anything to the contrary herein contained,* present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to the date will, *subject to the conditions hereinafter set forth,* receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, during the life of the penisoner at no cost to the pensioner.

From this language, it is unclear whether the termination of the agreement in Section 8 supercedes this provision through the terms, "subject to the conditions hereinafter set forth," or whether Section 8 is itself superceded by the language, "Despite anything to the contrary herein contained." In addition, it is unclear whether the phrase, "during the life of the pensioner," was intended to give the pensioner health insurance benefits *for life,* or

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[12] Joint Exhibit 1, at 3. (Emphasis added).

whether it simply meant that *spouses* would only receive benefits "*during the life of the pensioner.*"

The Sixth Circuit Court of Appeals, when confronted with a similar ambiguity in *American Pad*, looked to the remainder of the agreement to select the appropriate interpretation. 372 F.2d at 428. *Accord, Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982). In *American Pad*, the court noted that the provision preceding the one in question expressly limited itself to the "duration of the current Collective Bargaining Agreement." Since the drafters undoubtedly knew how to limit other provisions to the term of the agreement, the court reasoned that the failure to limit the provision in question indicated that it was to continue beyond the termination of the agreement. 372 F.2d at 428.

In the present case, the court looks to the 1979 Pension Agreement to resolve the current ambiguities over plaintiffs' health insurance benefits. Article X, Section 7, of the Pension Agreement indicates that parties clearly knew how to draft a provision that would continue beyond the termination of the agreement. Article X, Section 7, contains the following unambiguous language: [13]

> Any pension properly payable pursuant to this Agreement shall continue to be payable, *notwithstanding the termination or expiration of this Agreement.*

Neither the Insurance Agreement nor the Pension Agreement contains this type of unambiguous provision for plaintiffs' health benefits. Moreover, in Article IX of the Pension Agreement the Company expressly agreed to provide and maintain a separate "Pension Fund" [14] so that retirees would receive their pensions even if the Company ceased operating. No such provisions were made with

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[13] Joint Exhibit 11, at 25. (Emphasis added).

[14] Joint Exhibit 11, at 23.

respect to health benefits. Thus, following the reasoning of *American Pad,* the court finds the agreements in this case support the Company's construction that plaintiffs' health insurance benefits expired on August 31, 1982.

When the terms of an agreement are ambiguous, courts may look to the actions of the parties during the course of performance to resolve any ambiguities. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 161, 87 S. Ct. 369, 371 (1966); *Randall v. Lodge No. 1076, International Association of Machinists and Aerospace Workers*, 648 F.2d 462, 466 (7th Cir. 1981). *See also*: U.C.C. §§ 2-202 and 2-208 (1972 version). In the present case, while the court believes that it is unnecessary to look at the actions of the parties to interpret the agreements, such actions are ambiguous at best and lend little support to plaintiffs' claims.

For example, plaintiffs place great weight in the fact that the Company provided health insurance benefits for pensioners during a 1979 strike, when all agreements between the Company and the Steelworkers had expired. However, C. A. Covington, Secretary of the Company and a member of its Board of Directors, testified that the Staff Representative of the Steelworkers, Kenneth Williams, asked him to continue these benefits to pensioners during the strike. Mr. Williams testified that he never made such a request; however, Mr. Covington testified that the Company granted Mr. Williams's request solely as a goodwill gesture, since many of the striking employees had relatives who were pensioners.

Plaintiffs also rely on the testimony of Eli Moga, Personnel Manager of the Company. Mr. Moga testified that he told the retirees the insurance and pension agreements provided them with health insurance benefits *for life;* however, Mr. Moga's testimony is equally consistent with the Company's view that pensioners would receive the

benefits for life, *subject to the expiration of the agreements.*

One action that weighs against plaintiffs is the Steelworkers' failure to insist that the Company fund these benefits. If the Steelworkers expected the health insurance benefits to continue even after the Company ceasd operating, they should have insisted that the Company fund the insurance benefits, as it did with the pensions. Since the terms of the agreements and the actions of the parties both support the Company's position that the health insurance benefits expired on August 31, 1982, the court finds that plaintiffs' claims *under the agreements* are unlikely to succeed at trial.

3. *Plaintiffs' Claim Not Based Upon the Agreements*

Plaintiffs also make a second claim, in the nature of estoppel, that goes beyond the agreements themselves. Plaintiffs claim they have a vested right to the health insurance benefits because they retired with a reliance on the Company's promise to pay these benefits "for life." In a case involving similar facts, Chief Judge Rubin of the Southern District of Ohio held that the "vesting" of health insurance benefits for retirees depends solely upon the terms of the Collective Bargaining Agreement. *Metal Polishers Local No. 11 v. Kurz-Kasch*, 538 F. Supp. 368 (S.D. Ohio 1982).[15] The Chief Judge stated:

> The Court has been unable to locate any federal decision which addresses the issue of whether bene-

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[15] In *Metal Polishers*, the Collective Bargaining Agreement between the union and the employer expired on September 15, 1975, and the union went on strike. Two months later, the company decided to close the plant permanently. At issue in the case were group life and health insurance policies for the company's retirees. The retirees argued that these benefits were "vested," notwithstanding the termination of the Collective Bargaining Agreement. The court held that these benefits were not vested, but rather, they terminated when the underlying agreement expired.

fits provided to retirees under a Collective Bargaining Agreement may become "vested" despite evidence of a contrary intent under the terms of the Agreement. On the contrary, the cases arising out of the federal courts which have dealt with the issue of whether health or life insurance benefits for retirees are "vested", have been decided solely under the terms of the Collective Bargaining Agreement or other contractual means providing for such benefits. *Turner v. Teamsters, Local 302*, 604 F.2d 1219, 1225 (9th Cir. 1979); *United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO v. Lee National Corp.*, 323 F. Supp. 1181, 1188 (S.D.N.Y. 1971).

538 F. Supp. at 374. The Chief Judge then concluded:

Based on the facts of this case, the Court declines to find that the defendant is under an implied obligation arising out of the employment relationship to continue to pay the premiums for retirees on the insurance policies provided for in the Collective Bargaining Agreement. . . .

. . . .

The Court understands that many of the retirees in this case may have relied upon the defendant's provision of these insurance benefits and contemplated their continuation for the remainder of their lives. The Court also notes that they had no part in the Union's decision to strike in September of 1975. The fact, however, is undisputed that these benefits were only provided under Collective Bargaining Agreements with specific termination dates. . . .

The Court has already determined that there is no evidence of an intention on the part of the Union or the employer to establish such vested rights on behalf of the retired employees. In the absence thereof, an implied obligation to provide such unanticipated in-

surance coverage for retired employees should not be imposed.

538 F. Supp. at 374-75.[16]

In the present case, since the terms of the agreements directly contravene plaintiffs' claim that the benefits are vested, and the actions of the parties are ambiguous at best, the court finds that this second claim is unlikely to succeed at trial.

4. *Conclusion*

The court finds that plaintiffs have failed to make "a strong showing of probable success at trial," either under the terms of the agreement, or under any other theory. Since the court finds that plaintiffs are unlikely to succeed at trial, it is unnecessary to determine whether they have met the other three requirements of *North Avondale*.

Accordingly, plaintiffs' motion for a preliminary injunction is denied.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

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[16] The Chief Judge emphasized the distinction between pension plans and life and health insurance benefits. He stated:

> It is important to note that this case does not involve the retirees vested interest in a pension. The concern over the lack of employee protection in retirement plans prompted Congress to enact the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* in 1974. The statutory vesting requirements contained in ERISA, however, apply only to pension plans and not to health and life insurance benefits. 29 U.S.C. § 1051(1).

538 F. Supp. at 374. *See also: Turner v. Teamsters, Local 302*, 604 F.2d 1219, 1225 (9th Cir. 1979):

> Pensions are paid from an actuarily predetermined fund and are guaranteed for life. Health and welfare benefits are negotiated periodically and are paid from a fund consisting of employer contributions and last only the life of the collective bargaining agreement.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3301

JOSEPH POLICY, *et al.*,
Plaintiffs-Appellants,
v.

THE POWEL PRESSED STEEL COMPANY,
Defendant-Appellee.

[Filed August 20, 1985]

Before: MERRITT and CONTIE, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated with regard to Plaintiffs Policy and Driscoll and the case is remanded for further proceedings consistent with this opinion; the case with regard to Plaintiff Chufo is remanded with instructions to dismiss his claim.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk
A True Copy.
Attest:

/s/ Gary McCarthy
Deputy Clerk

Issued as Mandate: October 23, 1985

COSTS: None

Filing fee.....$

Printing .....$

Total .....$

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C82-2402
JUDGE JOHN M. MANOS

JOSEPH POLICY, WILLIAM DRISCOLL, JOHN CHUFO,
Plaintiffs,

v.

THE POWELL PRESSED STEEL COMPANY,
Defendant.

[Filed November 26, 1985]

ORDER

On November 22, 1985, the United States Court of Appeals for the Sixth Circuit granted the defendant's motion to recall the mandate and to issue a stay pending application for writ of certiorari.

Accordingly, the above-captioned case is hereby transferred to the Office of the Clerk of Court, where it shall be placed on suspended status and removed from the court's active docket. When the stay is removed, the parties in the above-captioned case shall so notify the Clerk of Court who will then transfer this matter to this court's active docket.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3301

JOSEPH POLICY; WILLIAM DRISCOLL; JOHN CHUFO;
Plaintiffs-Appellants,

vs.

THE POWELL PRESSED STEEL COMPANY,
Defendant-Appellee

[Filed November 22, 1985]

ORDER

Upon consideration of the appellee's motion to recall the mandate and to issue a stay pending application for writ of certiorari.

IT IS ORDERED that the motion be, and it hereby is, granted, and the mandate is recalled.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3301

JOSEPH POLICY, WILLIAM DRISCOLL, JOHN CHUFO,
Plaintiffs-Appellants,

v.

THE POWEL PRESSED STEEL COMPANY,
Defendant-Appellee.

[Filed October 15, 1985]

Before: MERRITT and CONTIE, Circuit Judges, and BROWN, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John Hehman
JOHN P. HEHMAN
Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C82-2402Y

Judge John M. Manos

JOSEPH POLICY, *et al.*,
Plaintiffs,

v.

THE POWEL PRESSED STEEL COMPANY,
Defendant.

[Filed March 14, 1984]

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the court enters judgment for the defendant.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

APPENDIX I

JOINT EXHIBIT 1

INSURANCE AGREEMENT

THIS AGREEMENT, dated as of September 1, 1979, between THE POWELL PRESSED STEEL COMPANY of Hubbard, Ohio, (hereinafter referred to as the "Company"), and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO (hereinafter referred to as the "Union").

It is agreed by and between the parties hereto as follows:

Wherever used herein

(a) the term "Basic Agreement" means the labor agreement between the Company and the Union dated September 1, 1979, or any successor agreement between the Company and the Union which is, during the life of this Insurance Agreement, applicable to such employees;

(b) the term "Employee" means any employee of the Company who, from time to time during the term of this Agreement, shall be in the bargaining unit which is defined in the Basic Agreement;

(c) the term "Pensioner" means any person who is retired from employment with the Company and is receiving a pension under the Pension Plan.

Section 1. The Company and the Union have agreed upon a program of insurance benefits for the Employees, as set forth in the Program of Insurance Benefits, attached hereto and made a part of this Agreement, the basic coverage being as follows:

(a) Hospital Service—Basic Steel Semi-Private Room Plan with a provision for emergency room treatment at the hospital shall be provided.

(b) Surgical Expense Indemnity-Schedule Based on Full payment of Doctor's reasonable and customary fee.

(c) Life Insurance Benefits of Eight Thousand ($8,000.00 Dollars.

(d) Sickness and Accident Benefits of One Hundred Ten ($110.00) Dollars per week. Effective September 1, 1980, benefits shall be increased to One Hundred Twenty ($120.00) per week.

(e) The Hospitalization, Surgical and Major Medical Benefit plans shall provide the same benefits as are provided under the Basic Steel Agreements with the United Steelworkers of America.

(f) Effective September 1, 1980, the Company will provide a dental plan providing that after the first Twenty-Five Dollars of covered expense during each program year for single coverage and the first Fifty Dollars ($50.00) of covered expense during each program year for family coverage, the carrier will pay Eighty (80%) of covered expense for dental procedures.

Section 2. The total cost of this program of insurance benefits shall be borne by the Company; provided, however, life insurance will be continued during layoff up to two years with employees paying Sixty Cents ($.60) per month for each One Thousand ($1,000.00) Dollars of life insurance after the first six months of layoff. This provision will apply only to employees with two years or more continuous service at the date of layoff.

Hospitalization and surgical coverages will be continued during the first six months of layoff for employees with two years or more of continuous service at the date of layoff.

In the event of a strike, the insurance program, with the exception of sickness and accident benefits, will be

continued for thirty (30) days. The Company will advance the premiums for coverage during such thirty (30) days which premiums will be repaid by the employees from the first pay received after the discontinuance of the strike.

It is further stipulated and agreed that inasmuch as the Company is paying the cost of the insurance benefits, dividend refunds, if any, paid by the insurance carrier shall be and become the sole property of the Company during the term of of this Agrement or any extension thereof.

Section 3. Despite anything to the contrary herein contained, present pensioners who have, prior to August 31, 1976, elected and maintained hospitalization and surgical coverage and those who retire subsequent to that date will, subject to the conditions hereinafter set forth, receive medicare complementary coverage on their hospitalization and surgical benefits for the pensioner and his spouse, if any, during the life of the pensioner at no cost to the pensioner.

In order to be eligible for the above coverage, employees who reach age sixty-five (65) during the term of this contract, or any extension hereof, and become eligible for pension must decide, on or before three (3) months after said employee's sixty-fifth (65th) birthday, whether to retire or continue to work. If the employee continues to work beyond the three (3) month period, he will be deemed to have waived the provisions of this Section 3 and will not thereafter, during the term of this Agreement, receive insurance coverage as herein set forth in this Section 3.

Section 4. It is intended that the provisions for insurance benefits contained herein shall comply with and be in substitution for provisions of similar benefits which are or shall be made by any law or laws.

Section 5. The failure of the insurance company to provide any of the benefits for which it has contracted

shall result in no liability to the Company or the Union nor shall such failure be considered a breach by the Company or the Union of any of the obligations which they have undertaken by this or any other Agreement. However, in the event of any such failure, the Company and the Union shall immediately take steps to provide substitute coverage.

Section 6. This Agreement is in full settlement of all the issues in dispute between the Company and the Union pertaining to a program of insurance benefits.

Section 7. This Agreement and the Basic Agreement shall be negotiated at the time set forth for negotiation in the Basic Agreement dated September 1, 1979.

Section 8. This Agreement shall become effective on September 1, 1979, and shall remain in effect until midnight, August 31, 1982.

THE POWELL PRESSED STEEL COMPANY

By: /s/ William R. Powell
WILLIAM R. POWEL
President

UNITED STEELWORKERS
OF AMERICA

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ Frank J. Valenta

/s/ Ken Williams

NEGOTIATING COMMITTEE,
LOCAL 1515

/s/ Edward R. Pishkin Jr.

/s/ Robert A. Hettuah

/s/ Robert D. Strachan

/s/ Darnell E. Soltis

APPENDIX J

JOINT EXHIBIT 11

THE POWELL PRESSED STEEL COMPANY PENSION AGREEMENT WITH THE UNITED STEELWORKERS OF AMERICA

THIS AGREEMENT dated September 1, 1979 between THE POWELL PRESSED STEEL COMPANY, Hubbard, Ohio (hereinafter referred to as the "Company"), and the UNITED STEELWORKERS OF AMERICA (hereinafter referred to as the "Union").

The parties agree as follows:

* * * *

ARTICLE III

ELIGIBILITY REQUIREMENTS

1. Any Employee who, at the time of his retirement on or after February 10, 1979, shall have had at least 10 years continuous service and shall have attained the age of 62 years shall be entitled to receive a pension upon his retirement. The Company will provide and pay for the regular hospitalization and surgical benefits provided by it for any Employee who retires after September 1, 1979, prior to reaching age 65. When said Pensioner reaches age 65, the Company will provide such Pensioner, at the Company's expense, supplemental medicare and major medical benefits. The Company will continue to provide, at its expense, supplemental medicare and major medical benefits for Pensioners aged 65 and over.

* * * *

ARTICLE IX

FINANCING AND PENSION TRUST

1. For the purpose of providing the Pension benefits set forth in this Agreement, the Company may execute

a Trust Agreement with a trustee or trustees selected by the Company to manage and operate the Pension Fund and to receive, hold and disburse such contributions, interest and other income as may be necessary to pay such of the pensions or portions thereof under this Plan as are not provided for by an insured fund. The Company may establish an insured fund with such insurance company or companies as it may select for the payment of such of the pensions or portions thereof under this Plan as are not provided for in a trusteed fund.

The Company will determine the form and terms of any such Trust Agreement; may modify any such Trust Agreement from time to time to accomplish the purposes of this Plan; may remove any trustee and select any successor trustee; and select and change insurance companies.

2. The Company intends to and will make such contributions to the Pension Fund for the purpose of providing pensions under this Agreement as shall be required under accepted actuarial principles (including the amortization of past service on a thirty year basis) to maintain the Pension Plan in a sound condition and shall pay for the expenses incident to the operation of the Fund. No employee shall be required to contribute to the Fund.

ARTICLE X

MISCELLANEOUS

* * * *

7. Any pension properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement.

* * * *

9. This Agreement shall become effective as of September 1, 1979, and shall expire at midnight, August 31, 1982.

THE POWELL PRESSED
STEEL COMPANY

By: /s/ William R. Powell

THE UNITED STEELWORKERS
OF AMERICA

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]

/s/ Frank J. Valenta

/s/ Ken Williams

/s/ Edward R. Pishkin Jr.

/s/ Darnell E. Soltis

/s/ Robert D. Strachan

/s/ Robert A. Hettuah